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Legal transplant, development of the rule of law and post-colonial certainty in the Commonwealth Caribbean

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Legal Transplant, Development of the Rule of Law and Post-Colonial Certainty in the Commonwealth Caribbean

by

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ABSTRACT

In a broad sense, the states comprising the Commonwealth Caribbean have shared a common historical development arguably rooted in their colonial history. The social composition of the region is largely cosmopolitan, reflecting a meeting of various races and ethnicities, who are mainly the descendants of British and European colonial settlers and indentured labourers, African slaves, indigenous peoples and East Indian indentured labourers. By the 1950's the movement towards independence by the British colonies gained momentum and these fledgling states with the newly acquired title of being independent from Britain were now tasked with the responsibility of creating a framework necessary to commence self-rule. Following independence, the majority of the Commonwealth Caribbean territories adopted the Westminster modelled constitutions to exist alongside a common law legal system which had been established as a result of the colonial process. The question remains however as to whether the various legal systems of the Commonwealth Caribbean have displayed sufficient adaptability in being able to address the intricacies of their diverse societies.

With regard to the aforementioned, the aim of this thesis is to consider whether the rule of law, legal tradition and legal norms of the Commonwealth Caribbean region are showing progressive signs to reflect and integrate local customs and traditions. This will be weighed against the still predominant post-colonial legacy of the Westminster-modelled system, which dominates the legal and governance systems of the region. In examining the relationship between a dominant Westminster derived system and the contemporary situations, the thesis will put forward the idea that legal institutions have an important role to play to support a reconciliation between the past and the present to ensure post-colonial certainty. Issues of diversity, and how the legal system can integrate

and respect the different Caribbean identities and customs is therefore essential to understand how the region can move away from a still predominant colonial Westminster driven legacy. The outcome of the thesis is therefore reliant on the consideration of how the rule of law, as manifested in existing legal norms, treat diversity and differences in belief systems, particularly in areas such as land rights, family ties and generally how equality is understood in the social and economic spheres. By looking at these key issues, this thesis wishes to evaluate to what extent a specific Commonwealth Caribbean legal identity has started to emerge, and how it has departed from the inherited Westminster-framed legal framework.

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INTRODUCTION

1. Aims and objectives of the research

The aim of this thesis is to consider whether the rule of law, legal tradition and legal norms of the Commonwealth Caribbean region are showing progressive signs and adaptability to the contemporary challenges faced by the Caribbean societies. This will be weighed against the notion of whether the nature and design of the prevailing legal framework is fostering a regressive environment in terms of a hesitance to depart from the Westminster heritage and common law derived legal system.

The objective of the thesis is to contemplate the notion that the region needs to arrive at a position of post-colonial 'certainty' and that enabling such discovery requires careful consideration of how existing legal norms address diversity and differences in belief systems, particularly in areas such as land rights, family ties and generally how equality is understood in the social and economic spheres. In this regard, these areas will inform the outcomes of the thesis, as determined by overarching issues such as the adoption of Westminster modelled constitutions which continue to face operational scrutiny, the interplay between state based legal norms and soft law and the influence of international law on domestic legal systems will also be considered.

This work also aims to promote dialogue on controversial areas such as the death penalty, reparations for slavery, individual vs. group rights and multiculturalism. The thesis proposes to be original in the area of Commonwealth Caribbean legal writing in that it will be attempting to interrelatedly look at legal transplant theory in a Commonwealth Caribbean context and the effects of this transplant; legacies of colonial era legal norms; the state of the Westminster modelled governance system and the development of the rule of law within these post-colonial societies. To do so the thesis

explores how important societal issues such as family ties, land inheritance, and religious traditions have been incorporated into, and examined by the legal system.

The research questions that will be considered within the thesis are:

(i) To what extent if any, has the Commonwealth Caribbean attempted to re-visit a colonial inherited Westminster modelled governance framework?

(ii) Is there a specific Commonwealth Caribbean legal identity, and to what extent is this expressed within the legal framework of the region?

(iii) To what extent has regional legal norms been influenced by international law?

The research methods employed within this thesis include:

(i) *Doctrinal Analysis* – to explore the evolution of judicial attitudes towards common law norms, and to determine whether judicial attitudes have changed in its interpretation of legal doctrine to accommodate international trends, particularly in the area of human rights;

(ii) *Jurisprudential Perspectives* – to examine in a philosophical context jurisprudential approaches to problem solving by deconstructing judicial thought and reasoning;

(iii) *Socio-Legal Research* – to analyse the existing legal system in a social context, especially in relation to the extent by which social attitudes have impacted on the rule of law and vice versa;

(iv) *Comparative Legal Analysis* – to examine converging and diverging legal practices amongst the Commonwealth Caribbean countries, as well as between the Commonwealth Caribbean countries and other jurisdictions as it relates to

matters such as constitutional developments, treatment of human rights and judicial and legal system reform.

Note on Landmark Decisions

The jurisprudence arising from landmark judgments which are identified and discussed in the thesis play a critical role in influencing the evolution of the rule of law within the Westminster-modelled framework which still give a prominent place to the role of precedents. The case analysis will also give insight into whether the current system has the capacity to seamlessly integrate new directions which are adjudicated by the courts, and the role played by court adjudication to reflect changes in society. In this regard, it will also be demonstrated that domestic courts are not passive, but instead play an important role in determining the extent by which changes in the rule of law ought to be influenced by developments at both the domestic and international level. Moreover, key regional and national cases which integrate international law are also important markers to evaluate how much the regional has moved away from a U.K.-dominant system. The discussion of jurisprudence emanating from the landmark judgments which are identified in the thesis is also intended to explore the extent by which the role of the courts can be likened to one of a social institution generating law which it believes serves the best interest of the public. Furthermore, new directions in the law which are put forward by the courts through its decisions suggest that instead of being regarded as monolithic entities with a static way of reasoning, these institutions possess the capability to function as important actors in bringing about social change.

2. Historical Background

The laws within a society as it exists are arguably a reflection of various fragments of the legal history of that society, taking the form of cultural, social and moral practices.

To understand or explain the behaviour of any society is to engage in discourse on how legal doctrine had been rooted within that society. As Simmons explains:

> Legal and political theories are not descriptions of brute facts. Nor are they merely postulated ideals or aspirations. Theories reflect and are reflected in our social relationships. And the historical development of our social life is itself a part of the intellectual evolution of our ideas. And, if understanding a moral or political concept is a matter of understanding the 'form of life' to which it belongs, an articulation of this or that conception may well require attention to its history. Moral and political values thus cannot and should not be discussed in isolation from the institutions and social histories that shaped them.[1]

In a broad sense, the states comprising the Commonwealth Caribbean have shared a common historical development from the inception of British rule. For over 350 years, the British held absolute control over the Commonwealth Caribbean, commencing in 1624 with the establishment of the first colonial settlement in St. Kitts.[2] Additional settlements followed shortly after in Barbados in 1627 and Jamaica in 1655, with the rest of the islands of the English speaking Caribbean being entirely under British rule by the end of the 18th century.[3] The colonial economies of these countries had been founded on the production of sugar obtained from the sugar cane crop, a process driven by slave labour and the slave trade, both of which are now accepted as fundamental violations of the rules of international law which breach *jus cogens* obligations.[4] The historical experience of slavery has been regarded as having a "deep and permanent imprint" on the constituents of the region.[5] Yet, preceding what Berry describes as the "horrors of the

[1] Nigel Simmonds, *The Decline of Juridical Reason: Doctrine and Theory in the Legal Order* (Manchester: Manchester University Press, 1984), 13.
[2] Ezekiel Rediker, 'Courts of Appeal and Colonialism in the British Caribbean: A Case for the Caribbean Court of Justice', *Michigan Journal of International Law*, 35 (2013), 213-251, (p. 218).
[3] Ibid.
[4] Mahmoud Cherif Bassiouni, 'Enslavement as an International Crime', New York University Journal of International Law and Politics, 23 (1991), 445-517.
[5] David Berry, *Caribbean Integration* Law (Oxford: Oxford University Press, 2014), 17.

institution of slavery"[6] the region was faced with another atrocity evidenced by the near genocide of various indigenous ethnic groups. Prior to the arrival of Christopher Columbus to the Caribbean in 1492 and the increase in European conquests within the region, the countries were inhabited by indigenous peoples such as the Ciboneys, Tainos, Arawaks and Caribs whose cultures can be traced to the year 2,500 B.C.[7] Indigenous populations began to decrease following the arrival of the Europeans as a consequence of illness, forced labour, and destruction of their economic and spiritual systems, with practices such as capturing natives to be sold as slaves being permissible by law.[8]

During the 16th and 17th centuries, the English were able to solidify their presence in the Commonwealth Caribbean territories, as well as in Trinidad by 1797. The "Triangular Trade" drove imperial interests in the region, with Caribbean ships transporting products such as sugar, rum, molasses, indigo and other raw materials to Europe, followed by the transportation of finished products from Europe to the west coast of Africa. The final leg of the path would see the transportation of slaves from Africa to the Caribbean, hence completing the "triangular" journey. At the time, this triangular trade between Europe, Africa and the Caribbean made the countries of the region the most prized colonial territories of the English and the French.[9] Between 1550 and 1950 there was a steady increase in per capita sugar consumption and Europeans, regardless of their class status consumed candy, coffee, cocoa, jams and tea.[10] Undeniably, the enslaved labour force was a critical element in the profitability of this enterprise, and the owners of the slaves or the 'planter class' was strongly represented in the British parliament during the 18th and 19th centuries.[11] The planter class was able to present to parliament an

[6] Ibid.
[7] Christoph Müllerleile, *CARICOM Integration Progress and Hurdles: A European View* (LMH Publishing Company, 2005), 18.
[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] Ibid.

agenda seeking to legislate for violence as a means of protecting their economic activities and maintaining a socio-economic hierarchy.[12] They also provided influential justification for a system of oppressive rule based on the common law notion which emphasised the protection of personal property, finding congruity with the prevailing ideology of slaves being property that could be sold, purchased, rented, mortgaged, inherited, willed and used to clear debts.[13]

The region experienced another period of substantial transformation to its socio-economic landscape with the termination of the slave trade by Britain in 1808, the abolition of slavery in 1833 and a transitional apprenticeship labour scheme which lasted until 1838. Sugar obtained from sugar cane as a commodity for trade could no longer hold its profitability, primarily as a result of competition from the production of beet sugar within Europe, economic mismanagement of sugar cane estates by landlords appointed by 'absentee owners' who preferred to be based in Britain, competition from other colonies, soil exhaustion and arguably a shift in attention by Britain to its domestic industrial development.[14] The decline of the sugar industry resulted in a reduction in wages and the number of jobs for the masses and by the late 19th century labour unrest began to develop.[15] In February 1896, workers who were campaigning for higher wages began looting shops in Basseterre, the capital of St. Kitts, with labour unrest soon spreading to Dominica in 1898, Trinidad in 1902 and Jamaica in 1903.[16] As Doumerc explains:

> These disturbances were all linked with social inequality, deprivation and the problem of land ownership. Indeed in most territories the best tracts of land had remained in the planters' hands and the peasants had had to make do with hillside plots where the

[12] Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems*, (New York: Routeledge-Cavendish, 2008), 21-25, 74-75.
[13] Ibid, 19.
[14] Eric Williams, *Capitalism and Slavery* (Chapel Hill: University of North Carolina Press, 1944).
[15] Eric Doumerc, *Caribbean Civilisation* (Toulouse: Presses universitaires du Mirail, 2003), 39-40.
[16] Ibid, 40.

> soil was poorer. In some islands like Barbados the lack of space had meant that the best lands were inaccessible for the peasants, whereas in larger islands like Jamaica, the problem was not so acute. But, on the whole, the land problem was a major cause of the disturbances....[17]

The usual response of the British government to disturbances in its Caribbean territories was to send a 'Royal Commission' but unfortunately their "recommendations often remained a dead letter."[18]

The ethnic composition of the regional population, particularly in Trinidad and Guyana and to a lesser extent Jamaica was also transformed as a consequence of the emigration to the region of East Indian labourers who were employed as indentured workers and given the task of replacing the emancipated slaves and reviving sugar cane production.[19] Other groups of persons who came to the Commonwealth Caribbean after the abolition of slavery, and whose descendants now live in the region include the Portuguese, Chinese, Lebanese and Syrians.[20]

By the 1950's the movement towards independence by the British colonies within the region gained momentum. These states with the newly acquired title of being independent from Britain were now tasked with the responsibility of creating the legal framework necessary to commence self-rule. Following independence, the majority of the Commonwealth Caribbean territories adopted within their constitutions a Westminster based political majoritarian system "characterised by the concentration of power in the hands of the largest political party elected to power by the voting public"[21] as part of a dual executive power structure, with a head of government and a head of state.

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[17] Ibid.
[18] Ibid.
[19] Ibid, 63.
[20] Ibid.
[21] Samuel Bulgin QC, 'The Metamorphosis of the Original Westminster-Whitehall Constitutional Model as exported to the Commonwealth Caribbean', Conference Paper, UCCI with the UWI (Mona) Conference: 50-50 - Surveying the Past, Mapping the Future (March 2012), 2.

It is along these lines that an ideology developed whereby the rule of law was understood as the exercise of state power according to law and the subjugation of state power to the constitution. The independent Commonwealth Caribbean states kept with Britain as their 'parent' country, as evidenced in their constitutions recognizing the British monarch as Head of State, and governors general acting as personal representatives of the monarch. The period closely following independence also witnessed Guyana in 1970 and Trinidad and Tobago in 1976 establishing themselves as constitutional republics, with Dominica becoming a republic on independence in 1978. The timeline of Independence amongst the Commonwealth Caribbean countries are Jamaica (1962), Trinidad and Tobago (1962), Barbados (1966), Guyana (1966), the Bahamas (1973), Grenada (1974), Dominica (1978), St. Lucia (1979), St. Vincent and the Grenadines (1979), Belize (1981), Antigua and Barbuda (1981) and St. Kitts and Nevis in 1983.[22]

With the exceptions of the Roman-Dutch system of land ownership in Guyana and the French Civil Code of St. Lucia which has fused common law and civil law, the common law of England remains the common law of the former colonies. For the purpose of socio-economic and legal integration, the independent countries of the region have organised themselves into a customs union known as the Caribbean Community (CARICOM). The Caribbean Court of Justice (CCJ), which is the judicial arm of CARICOM was inaugurated in 2005, and is empowered to act both as an appellate court for those states which have accepted its jurisdiction, as well as a treaty interpreting body for those states that are signatories to the Revised Treaty of Chaguaramas (RTC),[23] the treaty which established CARICOM.

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[22] Hamid Ghany, 'The Commonwealth Caribbean: Legislatures and Democracy', in Nicholas D J Baldwin (ed.) *Legislatures of Small States: A Comparative Study* (Abingdon: Routledge, 2012), 23.
[23] Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy (adopted 5 July 2001, entered into force 2 April 2002) 2259 UNTS 293 (RTC).

3. Diversity and Normative (In) Equality

An ongoing theme throughout this thesis is the extent to which the various legal systems of the Commonwealth Caribbean have displayed any elements of dynamism in embracing a diverse society. According to Antoine, plural groups in the Commonwealth Caribbean are not given adequate, if any, recognition by the law and legal systems of the various states in the region, even where these groups from a significant part of the society. [24] The social composition of the Commonwealth Caribbean is largely cosmopolitan, reflecting a meeting of various races and ethnicities, who are mainly the descendants of British and European colonial settlers and indentured labourers, African slaves, indigenous peoples and East Indian indentured labourers who were either of the Hindu or Muslim religious faith. If it is accepted that the rule of law within a state ought to be shaped by societal considerations, especially in terms of addressing diversity and varied belief systems, then the question also arises as to what extent have these identities in fact been discovered. Furthermore, the evolution of the law ought to be parallel to the discovery of social and cultural identities, and in a post-colonial Commonwealth Caribbean context, this remains a work in progress.

A well-known consequence of British colonisation was the development of an economic and labour model by which forced labour and the slave trade was an essential cog. The climate in the region as well as its fertile land was ideal for growing profitable crops such as sugar cane and cocoa, and as a result, many European colonisers transformed the islands into plantation economies dedicated to producing mainly sugar and cocoa for European export.[25] Mass production required a cheap labour force and by the 1750's it was estimated that almost nine out of ten men and women in the Caribbean

[24] Antoine, *Law and Legal Systems* (see n. 12, p.6), 7.
[25] Ibid.

islands were slaves.[26] In terms of societal structure, a rigid social system was enforced, separating white plantation owners and managers from the enslaved Africans. By the 18th century, around eighty to ninety percent of the sugar being consumed by Western Europe was being produced in the Caribbean.[27] This level of production came at a grave human cost, as death rates amongst slaves were higher than birth rates, so that the sugar estates could only survive through the constant importation of new slaves.[28] The enormous profits generated from the Caribbean islands meant that the planter class grew in power and stature, and its interest was strongly protected in the British parliament.[29] Violence against slaves was legitimized as a means to preserve economic profitability and protection of the socio-economic order, and justification was embedded in the common law, with its emphasis on the protection of personal property.[30]

The design of this system however did not acknowledge any notion of it being based on discrimination and natural justice violations. As Kedar notes, political regimes acting in an ethnocratic structure would construct legal categories and establish systems of differentiation which would justify the application of discriminatory rules, without admitting that the outcome is one of discrimination.[31] The purpose of this is "to attempt to contain the loss of reputation caused by the loss of the moral high ground, which is a consequence of such an oblique move."[32] In this regard, Antoine ascertains that an entire system of laws developed around the central idea of slaves being property and it is arguable that "the slave was the premise for the very creation of modern law."[33] Any narrative on the poor state of development in the human rights arena ought to include that

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[26] Ibid, 219.
[27] Ibid, 220.
[28] Ibid, 219.
[29] Ibid, 220.
[30] Rediker, 'Courts of Appeal and Colonialism in the British Caribbean' (see n. 2, p.4), 219.
[31] Alexandre Kedar, 'On the Legal Geography of Ethnocratic Settler States: Notes Towards a Research Agenda', *Current Legal Issues*, 5 (2003), 401-441, (p. 404, 418, 420, 425).
[32] Michele Graziadei, 'Legal Transplants and the Frontiers of Legal Knowledge', *Theoretical Inquires in Law*, 10 (2009), 723-743, (p. 742-3).
[33] Antoine, *Law and Legal Systems* (see n. 12, p.6), 19.

the modern day persistence with the death penalty and corporal punishment may be the reflection of a mentality rooted in colonial tradition. Clause XII Act for the Governing of the Negroes (1688) in Barbados for example, legislated that any criminal act which caused damages in excess of 12 pence would result in the slave being arrested, arraigned and then tried and sentenced by a justice of the peace, with the slave facing the death penalty if found guilty.[34] Contrary to this, there was minimal or no penalties for offences, including murder committed by the white population against slaves. A dualistic system was created whereby there were separate courts for slaves, and one set of laws for the master and another for the slaves. Critically, the law failed to adapt to address the post-emancipation landscape and the needs of "newly liberated peoples who were landless, powerless, largely uneducated, culturally and psychologically emasculated and still tied to the plantation." [35] A post-slavery pluralistic society with components of institutionalised divisions along the lines of class and race was now in its infancy and its often unattended and prolonged development has been blamed for "an enduring imbalance within the legal system."[36]

What existed at the time was a rule of law defined by racial and by extension class divisions as well as a mentality of racial superiority and oversight by the colonizers. Loomba for instance shows that colonial administrators hoped for inter-racial mixings since it was thought that this would create an ideal colonial subject.[37] She quotes Sir Harry Johnson, the first commissioner of British Central Africa, who stated in 1894 that:

> On the whole, I think the admixture of yellow that the Negro requires should come from India, and that eastern Africa and British central Africa should become the America of the Hindu. The mixture of the two races would give the Indian the physical development which he lacks, and he in turn would transmit to his half-Negro offspring

[34] Ibid, 20.
[35] Ibid, 24.
[36] Ibid.
[37] Ania Loomba, *Colonialism/Postcolonialism* (London: Routledge, 1998), 121

> the industry ambition, and aspiration towards civilized life which the Negro so markedly lacks.[38]

Deconstructing modern day racial and ethnic identities and their treatment by the law therefore comes against a background of colonial oppression, and racist ideologies in a historical context. As will be discussed, there is a strong argument to support the view that the islands of the Commonwealth Caribbean were colonized primarily as a colonial capitalist venture. Ideologies of capitalism, imperialism and globalization are explicably linked and in a climate where these three areas are heavily intertwined, legal rules are constructed accordingly as to offer adequate protection to these interests.

Another issue affecting the development of a rule of law which adequately addresses the requirements of a diverse society, as well as the development of regional identity in itself is the notion that the colonial capitalist and imperialist framework has been supplanted with modern day hegemony driven, as was in pre-colonial times, by capital gain. Wallerstein describes this modern day capitalist system:

> The reality of the modern world system, the capitalist world-economy is that it is a hierarchical, unequal, polarizing system, whose political structure is that of an interstate system in which some states are manifestly stronger than others. In furtherance of the process of the endless accumulation of capital, stronger states are onstantly imposing their will on weaker states, to the degree that they can. This is called imperialism, and is inherent in the structure of the world system.[39]

This argument gives credence to the Marxist ideology that economic structures, processes and purposes heavily influence social classification. In a colonial context, the labour force was appropriated along racial divides and the formation of a privileged 'white' class, and the after-effects of this arrangement still resonate in Commonwealth Caribbean society in terms of how persons of different races are perceived. It also goes

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[38] Ibid.
[39] Immanuel Wallerstein, 'Cultures in Conflict? Who are We? Who are the Others?', *Journal of the Interdisciplinary Crossroads*, 1:3 (2004), 505-521, (p. 510).

some way in explaining the manner in which economic disparities amongst different racial groups are perceived. Loomba further explores this notion of socio-economic divisions along the lines of racial and class divides, stating:

> The ideology of racial superiority translated easily into class terms. The superiority of the white races, one colonist argued, clearly implied that 'the black men must forever remain cheap labour and slaves.' Certain sections of people were thus racially identified as the natural working classes. The problem was now how to organise the social world according to this belief, or to force the population into its "natural" class position: in other words, reality had to be brought into line with that representation in order to ensure the material objective of production.[40]

The abolition of slavery signalled a disconnect between capitalist interest driven by the slave trade and the very legal rules which had previously protected this system. However, the case may be made that where the legal system falls short is addressing perceptions of identity in the context of social hierarchies fuelled by economic interests. Writing in 1980, Rex states:

> When the social order could no longer be buttressed by legal sanctions it has to depend on the inculcation in the minds of both exploiters and exploited of a belief in the superiority of the exploiters and the inferiority of the exploited. Thus it can be argued that the doctrine of equality of economic opportunity and that of racial superiority and inferiority are complements of one another. Racism serves to bridge the gap between theory and practice.....when inequality, exploitation and oppression are challenged by economic liberalism, they have to be opposed by doctrines which explain the exceptions to the rule. While it is admitted that all men are equal, some men are deemed to be more equal than others.[41]

Thus, there is compelling reason to show that Commonwealth Caribbean societies are still in a transitional search for normative equality in terms of finding its individual

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[40] Loomba, *Colonialism/Postcolonialism* (see n. 37, p.11), 126.
[41] John Rex, 'Theory of Race Relations: A Weberian Approach', in UNESCO (ed.) *Sociological Theories, Race and Colonialis* (Paris: UNESCO, 1980), 116-142, (p. 131).

and collective identity. As will be discussed, this normative identity would only be achieved if barriers which are remnants of a previous rule of law which is limited in its scope is completely challenged and revised.

4. Rule of Law: Theoretical Considerations

As mentioned previously, and as will be discussed within this thesis, the foundations of the rule of law in the Commonwealth Caribbean were arguably built on the intention of cementing the presence of colonial power and consolidating the colonial state. Jayasuriya in writing on the former colonial regions of East Asia explains:

> ....notions of the rule of law need to be understood in the context of notions of political authority and rule embedded in the very interstices of the state. In much of East Asia, the post-colonial state was trapped in the repertoire of political rule established by the colonial state.[42]

This viewpoint holds the same for the Commonwealth Caribbean region and the question arises as to whether the prevailing legal norms have evolved in a sufficient manner to address the needs of a diverse Commonwealth Caribbean society. By this measure, it will be discussed that the rule of law principle of equality before the law "guarantees consistency, but is entirely ignorant as to whether everybody is able to, in fact, benefit from his or her rights."[43] Unger puts forward the argument that the formal conception of the rule of law attempted to mask substantive inequalities within liberal society, and that in the modern day, this approach is increasingly unattainable.[44] As an opposite to the formal conception of the rule of law, Dworkin suggests a substantive

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[42] Kanishka Jayasuriya, 'A framework for the analysis of legal institutions in East Asia', in Kanishka Jayasuriya (ed.) *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* (London: Routledge, 1998), 2.
[43] Jessica Almqvist, *Human Rights, Culture, and the Rule of Law* (Portland, Oregon: Hart Publishing, 2005), 47.
[44] Roberto Mangabeira Unger, *Law in Modern Society* (New York: The Free Press, 1976), 176-181, 192-223.

approach whereby the courts should be adjudicating on cases based on the best theory of justice which is applicable to the questions in which it is asked to answer.[45] As Dworkin points out however, proponents of the formal approach declare that substantive justice is an independent ideal which does not form part of the rule of law.[46] Nonetheless, Dworkin makes the case for a substantive approach to the rule of law whereby individual rights are included within the rule of law. Accordingly, he states:

> I shall call the second conception of the rule of law the "rights" conception. It is in several ways more ambitious than the rule book conception. It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule book conception does, between the rule of law and substantive justice; on the contrary it requires, as a part of the ideal of law, that the rules in the rule book capture and enforce moral rights.[47]

As Dworkin explains, the 'rule book' represents an effort to capture moral rights, but the 'rule book' can be silent in addressing certain areas, or can produce conflicting interpretations. Proponents of a formal approach to the rule of law however, such as Raz contend that the rule of law is just one virtue by which a legal system may be judged, and should not be confused with matters such as democracy, justice, equality and human rights.[48] However, Allan argues that formal conceptions of the rule of law are actually

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[45] Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985) 11-13.
[46] Ibid, 11.
[47] Ibid, 11-12.
[48] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press 1979), 211.

based on substantive foundations such as respect for the individual and moral autonomy, so that it is unrealistic to maintain a separation between form and substance.[49]

Despite varying approaches to how the nature of the rule of law is regarded, it remains a central principle in the governance of Commonwealth Caribbean societies. In applying theories addressing approaches to the rule of law, it will thus be considered within this thesis whether the rule of law sufficiently recognises and addresses those traditions and belief systems in the region which exist outside the scope of formal law.

5. Chapter Outlines

Chapter I will consider the reception and transplant of English law in the Commonwealth Caribbean as well as the adoption of Westminster modelled Constitutions by states in the region following their independence. In doing so, it will address how legal norms have been shaped by the transplant of colonial law. It will also introduce the issue of whether regional legal systems adequately reflect the legal traditions of the region.

Chapter II will consider the importance of the family to Commonwealth Caribbean society and how the regional family law jurisprudence is being shaped in its emergence from old British legislation. This Chapter will also suggest that the rule of law will only benefit where there is compromise between institutionalized hard law and social informal traditions, such as those which are evident in customary family practices.

Chapter III will look at various issues surrounding access to land and tenure security in the Commonwealth Caribbean. The shared colonial history of the treatment of land in the region is closely linked to problems associated with regional land ownership structures. It is from this background that this chapter considers the importance of a right to land, and how territories in the region have treated real property rights.

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[49] Trevor Allan, Law, Liberty and Justice, The Legal Foundations of British Constitutionalism (Oxford: Clarendon Press, 1993), pp. 28, 39.

Chapter IV will consider how Commonwealth Caribbean legal systems manage equality and diversity. It will consider the historical background of regional diversity in the region and put forward a case for the departure from elements of homogeneity in the law in its treatment of addressing the protection groups of peoples in terms of their varied belief systems. This chapter will also propose that in certain situations, the legal system ought to look beyond its legal construct of individualism protected through legal formalism and make decisions based on broader principles of equality.

Chapter V will put forward the argument that revisiting the past would enable access to a certain degree of post-colonial certainty, which is necessary to ensure the development of a specific regional rule of law. Indeed, the consequences of colonialism and the residual effects of colonial power have weighed heavily on rule of law development in the region. It will be discussed that there exists the need to confront the epistemic effects of the colonial process by re-visiting historical injustices which have heavily influenced the formation of the dominant economic system and social order.

Chapter VI will discuss the importance of the Caribbean Court of Justice (CCJ) as an actor in facilitating rule of law development in the Commonwealth Caribbean. It will discuss the background to the CCJ and its structure, as well as certain distinctive characteristics of the court. It will also put forward the view that the CCJ is a court more understanding of the normative culture of the Commonwealth Caribbean as opposed to the London based Judicial Committee of the Privy Council (JCPC). Diverging attitudes towards adoption the CCJ and the threat of politicizing of the court will also be considered. Overall, the issue of whether adoption of the CCJ by CARICOM Member States is pivotal in any movement towards attaining a regional court which embodies principles of collective autonomy and self-identity will be considered.

This thesis will then conclude by suggesting that attempts to revisit the Westminster framework have been slow and as a result the expression of a

Commonwealth Caribbean legal identity is restricted to the extent by which the Westminster modelled framework has adapted to become relevant to regional conditions. The absence of a lack of a proper foundation for the Westminster modelled constitutions in the Commonwealth Caribbean in terms of relevance is suggested to be a troubling systematic flaw. In conclusion, it will also be suggested there is the need to re-visit how legal relationships are defined between the state and non-state actors, as well as amongst non-state actors in terms of how rights are created and granted. In this regard, it will be suggested that a shift to a system allowing for decentralised governance, with the state's role being a facilitator of transactions would allow for a more dynamic rule of law which is better suited to differences in belief systems. Concluding comments on the value to Commonwealth Caribbean legal systems of international law as a decentralised legal system will also be expressed, with final thoughts on the future challenge of constitutional globalization.

CHAPTER I

TRANSPLANTING OF ENGLISH LAW AND THE WESTMINSTER SYSTEM

Introduction

This Chapter will consider the transplant of English law and the adoption of a Westminster modelled system in the Commonwealth Caribbean. This is important to set the basis for the aim and objective of the thesis, as it is from this starting point the progression of the rule of law is charted. Indeed, the character of the various legal systems of those states with former status as colonies of Britain in the West Indies reflects a largely Anglo-centric identity predisposed to jurisprudential thought deeply rooted in the common law tradition. In tracing the evolution of the legal system, the Chapter will firstly look at the historical reception of English law in the region, followed by a discussion on legal transplant theory in terms of its applicability to the Commonwealth Caribbean experience. It will then go on to consider the transfer of Westminster ideology by way of Westminster modelled constitutions adopted by Commonwealth Caribbean states at the time of their independence. Issues arising from the operation of Westminster model in the region will then be discussed, as well as concerns surrounding the retention of the Judicial Committee of the Privy Council (JCPC) by some states. The progress of economic, social and cultural rights in the post-independence period will also be discussed. The Chapter will conclude by introducing an area which will be further examined within the course of this thesis, which is whether the legal system is wholly reflective of the legal tradition of the region.

1. Reception of English Law in the Commonwealth Caribbean

A shared colonial history and common law rooted legal system is practically synonymous amongst the Commonwealth Caribbean states. By the 17th century, the West Indian region experienced colonization by the British, Danish, Dutch, French, Portuguese and Spanish who sought to expand their empire and economic capacity.[1] During this period, the British were able to assume colonial authority over Barbados, Montserrat, St. Kitts, Nevis, Antigua and Barbuda through settlement, as well as Trinidad, Jamaica, St. Vincent, Grenada, Dominica and St. Lucia of whom were ceded by treaty following various conflicts.[2] In a modern day context, and as a legacy of a shared colonial history, the West Indian islands together with Guyana, Bermuda and Belize are titled as members of the Commonwealth Caribbean. Other than the mixed legal systems of Guyana and St. Lucia, the legal systems of the rest of the island states comprising the Commonwealth Caribbean can generally be categorised as falling into the common law tradition. The birth of these legal systems as defined by the common law tradition came about through a shared colonial experience, which provided the opportunity for the transplanting of British law into the region, and by extension served as the basis for the doctrine of reception of English law within the colonies.

The method of reception of colonial law varied across the territories, mainly according to whether that particular territory was subject to settlement, as was the case in Barbados, Antigua and St. Kitts and Nevis, or whether the territory was subject to conquest or cession, for instance in the case of Dominica, Grenada, Jamaica and Trinidad and Tobago. In the territories that were settled by British subjects, those subjects were deemed to have taken English law with them, thereby eliminating the need for statutory

[1] Sandra W Meditz and Dennis M Hanratty (eds.), *Islands of the Commonwealth Caribbean: A Regional Study* (Washington DC: Federal Research Division, Library of Congress, 1989), 14-16.
[2] Ibid.

provisions which would receive the common law in those territories. The assumption was made that those settlers were considered to have imported English law to the land as a consequence of their settlement. In the words of Sir William Blackstone, "If an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force."[3] At this time however, settlers were regarded as only accompanying with them those laws that were applicable to their situation, with this importation being dated from the time of settlement. As Blackstone observed, those laws should be restricted to the extent that they are applicable only to the situation of the settlers and the condition of an infant colony, while removed from the "artificial refinements and distinctions incident to the property of a great and commercial people" which is neither "necessary nor convenient" for the settlers.[4]

With regard to the conquered or ceded territories, the law in force at the time remained effective until modified by the action of the Sovereign, thereby giving rise to the establishment of statutory reception provisions in order for English law to become applicable. The prevailing law remained until the moment where the British Parliament enacted new laws for governance under the Royal Prerogative. Prerogative power would end at the time when a legislative assembly was established within the ceded or conquered territory, with the British Parliament no longer having the prerogative to legislate for the colony. This was evidenced in *Campbell v Hall*[5] where the Court of the King's Bench held to be invalid a proclamation by the King imposing an export tax on the inhabitants of Grenada, an island which had been conquered from France and was also subject to an earlier proclamation granting an assembly to the island.

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[3] St. George Tucker, Blackstone's Commentaries on the Laws of England 1803, Volume 1 (New York: Kelley, 1969), 106-107.
[4] Ibid, 107.
[5] *Campbell v Hall* 98 ER 1045 (KB).

In a modern day context, each of the Commonwealth Caribbean territories display a basic common law structure from which generally domestic legislation has been established around. The law in these territories holds, according to Carnegie, a "residuary base"[6] in the common law of England. In 1879, the Judicial Committee of the Privy Council (JCPC) in *Trimble v Hill*[7] ruled that it was "of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same."[8] The two main exceptions to this are the territories of St. Lucia, whose legal system to a large degree is based on French law, and Guyana which has largely maintained its earlier system of Roman-Dutch law, particularly in the area of land law. An ongoing problem which the region faces, and which Carnegie confirms is that "the changes which have taken place in the common law of England have frequently not taken place here (the Commonwealth Caribbean), so you will find that the law of the West Indian states sometimes represents English law at an earlier stage than you will find presently in English law."[9] Commonwealth Caribbean courts have also developed a reliance on English jurisprudence, of which Anderson writes:

> The commonplace adherence of courts in the countries of the Commonwealth Caribbean to the decisions of the English courts is rooted in profound psychological and jurisprudential considerations of colonial domination. Not only was there the historical pre-eminence of English jurisprudence to accompany military conquest or peaceful settlement of Caribbean territories, but there was also, prior to the reception date, the actual incorporation of English law to constitute the substratum of the colonies' legal systems. Much of the work of Commonwealth Caribbean courts in the intervening centuries since the early 1600's has been the refinement of those founding

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[6] Ralph Carnegie, 'The Law in the English Speaking Caribbean', *Caribbean Background*, 17-23 September (1972), 46-47.
[7] *Trimble v Hill* [1879] UKPC 70, (1879) LR 5 App Cas 342.
[8] Ibid, 345.
[9] Carnegie, 'The Law in the English Speaking Caribbean' (see n. 6, p. 22), 46-47.

> principles in the light of the exigencies of the times. Judges have therefore followed, without inhibition, parallel developments in the 'mother country.'[10]

Antoine adds to this sentiment, writing that the countries of the Commonwealth Caribbean continue to display "excessive tendencies of reliance on the form, structure, substance and content of the law as expressed in England."[11] The tendency to rely on English jurisprudence can be traced to the transplanting of colonial law to the region. The impression of settlement followed by the transfer of English rooted law has shaped the identity of the region, from its jurisprudence, language, education and political systems.

2. Legal Transplant in a Commonwealth Caribbean context

A recurring theme throughout this thesis is how well have Commonwealth Caribbean legal systems, with their foundation in transplanted law, been able to provide justice while operating in a diverse society with varied traditions and belief systems. Indeed, it ought to be considered whether the method by which the transplant was undertaken has also left an imprint in how the society has developed. As Finnis writes:

> It is often supposed that an evaluation of law as a type of social institution, if it is to be undertaken at all, must be preceded by a value-free description and analysis of that institution as it exists in fact. But the development of modern jurisprudence suggests, and reflection on the methodology of any social science confirms, that a theorist cannot give a theoretical description and analysis of social facts, unless he also participates in the work of evaluation, of understanding what is really good for human persons, and what is really required by practicable reasonableness.12

Having established that English law as an aftermath of colonization forms the foundation for what is regarded as modern day law in the Commonwealth Caribbean, it would be important to consider the nature of legal transplants and as an afterthought,

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[10] Winston Anderson, *Double Renovoi and the Circulus Inextricabilis* (London: Butterworths, 1992), 313.
[11] Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (New York: Routledge-Cavendish, 2008), 39.
[12] John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 2011), 3.

whether the form of the law promotes justice and equity in light of the nature of the transplant. Ideas pertaining to the use of legal transplant may be traced backed to Plato, who suggested that the borrowing of ideas should be considered in order to make a new colony successful. In Book III of The Laws, during a conversation among *Athen*, *Clin* and *Megil*, *Clin* advises his counterparts:

> The greater part of Crete, you see, is attempting to found a certain colony and has put the Knossians in charge of the affair. The city of the Knossians has in turn delegated it to me and nine others. We have been commissioned to establish the same laws as the ones there, if we find some satisfactory; but if we discover some laws from elsewhere that appear to be better, we are not to hesitate about their being foreign. So now let's do ourselves - me and you two as well - this favour: making a selection from the things that have been said, let's construct a city in speech, just as if we were founding it from the very beginning. That way there will be an examination of the subject we are inquiring into while at the same time I may perhaps make use of this construction, in the city that is going to exist.[13]

In a modern day context, much of the debate about the diffusion of law is centred around Alan Watson's legal transplant thesis. Watson defines the term 'legal transplant' as the moving of a rule or system of law from one country to another, or from one people to another.[14] Watson treats law to the extent that the law is rules, and only that.[15] Watson qualifies this by stating that 'to a large extent law possesses a life and vitality of its own; there is no extremely close, natural or inevitable relationship between law, legal structures, instruments and rules on the one hand and the needs and desires and political economy of the ruling elite or of members of the particular society on the other hand.'[16] It would therefore follow according to Watson that rules are propositions which are not

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[13] Plato, *The Laws of Plato* (Chicago: University of Chicago Press, 1988), 88.
[14] Alan Watson, *Legal Transplants* (Athens, Georgia: University of Georgia Press, 1993), 21.
[15] Ibid, 96, 97.
[16] Alan Watson, Comparative Law and Legal Change, *Cambridge Law Journal*, 37 (1978), 313-336, (p.314-5).

socially connected to different societies and therefore historical considerations or other societal habits would neither limit nor qualify their transplantability.[17] Watson advocates the feasibility of legal transplants by claiming that one's own legal system may be improved through the practicality of borrowing from another legal system.[18] Watson's position revolves around two key arguments. Firstly, Watson argues that legal transplants are a common practice and that borrowing, albeit with adaptations, has been the norm with regard to legal development in the Western world.[19] Secondly, and somewhat contentiously, he claims that the transplanting of legal rules is socially, an easy process.[20] By this premise, Watson claims that it would be a relatively easy task to frame a single basic code of law to operate throughout the Western world. He further claims that law in a comparative context should be regarded as 'the study of the relationships of one legal system and its rules with another'[21] and asserts that the concern of the person engaging in comparison should solely be the existence of similar rules and not how they operate within society. [22]

It is questionable whether Watson's ideology when applied to the Commonwealth Caribbean would indicate that the aftermath of an English transplanted legal system largely devoid of addressing a diverse society has produced an inclusive system. The exploration of gaps between the law as it exists in the Commonwealth Caribbean and what it ought to be in terms of a diversity conscious approach will be continuously measured throughout this thesis. The argument will also be developed that a comparative and generally slow evolution of Commonwealth Caribbean legal systems has much to do with the uncertainty of cutting ties with the prior embracing of an Anglo-centred legal

[17] Watson, *Legal Transplants* (see n. 14, p. 24), 96- 97
[18] Ibid.
[19] Ibid, 95, 107
[20] Ibid.
[21] Ibid, 6.
[22] Ibid.

culture. Favour is instead found with the development of a system along Montesquieu's philosophy of social inclusiveness integrated within the form and spirit of the law. Regarding the form that law ought to embrace, Montesquieu writes:

> Law in general is human reason, inasmuch as it governs all the inhabitants of the earth: the political and civil laws of each nation ought to be only the particular cases in which human reason is applied. They should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another. They should be in relation to the nature and principle of each government; whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions. They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. In fine, they have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they ought to be considered.[23]

Montesquieu viewed development in a legal system as recognising the variability of law and dependent on factors such as climatic conditions, topography and demography of a particular society as opposed to historical milestones as indicators of progress.[24] For Montesquieu, law was a changeable entity because of necessity and would display variance according to the society, time and place.[25] In this regard, law was considered as a necessary component required for the functioning of a socio-political system.[26] Hence, it is also worth considering the perspective that a transplanted rule of law holds no validity when that 'rule' was in fact developed to address a different culture. This notion was put

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[23] Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws, (1748) trans. by Thomas Nugent* (Ontario: Batoche Books Kitchener, 1752), 23.
[24] Norbert Rouland, *Legal Anthropology* (London: Athlone Press, 1994), 20.
[25] Ibid.
[26] Ibid.

forward by Legrand who proposes that at a theoretical level legal rules cannot travel across jurisdictions 'unencumbered by historical, epistemological, or cultural baggage.'[27] Legrand argues that Watson makes no distinction between *law* and *legal rules,* and by 'legal rules' he understands Watson to be referring to matters such as statutory instruments and judicial decisions.[28] Conversely, Legrand claims that a rule is inclusive of cultural considerations supported by 'impressive historical and ideological formations' and of which are socially and culturally significant[29] As follows, 'the imported form of the words is inevitably ascribed a different, local meaning which makes it *ipso facto* a different rule.'[30] Legrand goes on to state that as the meaning of a rule changes, the rule itself changes and therefore in effect a transplant does not happen.[31] Kahn-Freund agrees with Legrand that most laws fall within a social and institutional framework and that 'we cannot take for granted that rules or institutions are transplantable'[32], but also suggests that some laws which have more autonomy than others could be transplanted across socio-political barriers.[33]

The restrictions of an Anglo-centred transplant to produce a socially inclusive legal system for a diverse Commonwealth Caribbean society may also be supported by Teubner's theory that a 'transplant' could instead be considered a 'legal irritant.' Whereas Watson's theory supports legal convergence as encapsulated in the term 'transplant,' Teubner makes a distinction between legal convergence as opposed to legal borrowing. Teubner, in stating his view on legal transplants being 'irritants' to a society elaborates:

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[27] Pierre Legrand, The Impossibility of Legal Transplants *Maastricht Journal of European and Comparative Law*, 4 (1997), 111-124, (p. 114).
[28] Ibid, 111, 116.
[29] Ibid.
[30] Ibid, 111, 117.
[31] Ibid, 111, 118.
[32] Otto Kahn-Freund, 'On Use and Misuse of Comparative Law', *Modern Law Review*, 37 (1974), 1-27.
[33] Ibid, 6.

> It is an outside noise which creates wild perturbations in the interplay of discourses within these arrangements and forces them to reconstruct internally not only their own rules but to reconstruct from scratch the alien element itself. 'Legal irritants' cannot be domesticated; they are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change.[34]

Whether the reception of an Anglo-centred rule of law was a 'transplant' as expounded by Watson or a 'legal irritant' in line with Teubner's perspective, it is suggested that this process has heavily influenced the character of modern day Commonwealth Caribbean legal systems. This will now further be explored with reference to the use of Westminster modelled post-Independence Constitutions and the retention of the Judicial Committee of the Privy Council (JCPC) as a final court of appeal.

3. The Westminster modelled System

According to Carnegie, no statement could be more "trite and elementary" than the statement that the Constitutions of those states who are members of the Commonwealth Caribbean are all, with the exception of Guyana, Westminster modelled Constitutions.[35] Despite of the constitutional histories of the countries that comprise the Commonwealth Caribbean in terms of whether they were settled, ceded or conquered colonies, "by the time of their independence each of these countries had been introduced to the so-called Westminster model of government and it is this system that was incorporated in each of the Independence Constitutions."[36] O'Brien explains that the

[34] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences', *Modern Law Review*, 61 (1998), 11-32, (p. 12).
[35] Ralph Carnegie, '*Floreat* the Westminster Model? A Commonwealth Caribbean Perspective', *Caribbean Law Review*, 6:1 (1996), 1-12, (p. 1).
[36] Derek O'Brien, The Constitutional Systems of the Commonwealth Caribbean: A Contextual Analysis (London: Bloomsbury Publishing, 2014), 29.

'Westminster model' "is not a legal term of art and it would be wrong to talk about it as if it were a single model, but it is, nevertheless, a useful shorthand for describing the system of government incorporated in the Independence Constitutions" [37] of the Commonwealth Caribbean states, while acknowledging that "we are talking about the Westminster model in both the narrow and wider sense of the term."[38] The general structure of the Westminster model is explained by de Smith, who states:

> The Westminster model can be said to mean a constitutional system in which the head of state is not the effective head of government; in which the effective head of government is a Prime Minister presiding over a Cabinet composed of ministers over whose appointment and removal he has at least a substantial measure of control; in which the effective executive branch of government is parliamentary inasmuch as Ministers must be members of the legislature; and in which Ministers are collectively and individually responsible to a freely elected and representative legislature.[39]

The countries of the Commonwealth Caribbean with Westminster modelled constitutions share the constitutional commonalities of providing for fundamental rights; a Prime Minister as the head of government; separation of powers amongst the executive, legislature and the judiciary; an independent elections commission, public service and judicial service and the ability of the Parliament to make laws for the purpose of achieving "peace, order and good government."[40] The majority of the Commonwealth Caribbean Constitutions post-independence provide for a bicameral parliament which comprises an elected lower House and a nominated upper House.[41] The British electoral system based on the first past the post system which provides for single-member constituencies is also adopted, with the exception of Guyana, which instead makes use of a proportional

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[37] Ibid.
[38] Ibid.
[39] Stanley Alexander de Smith, *The Commonwealth and Its Constitutions*, (London: Stevens and Sons 1964), 77.
[40] Hari N. Ramkarran, 'Seeking a Democratic Path: Constitutional Reform in Guyana', *Georgia Journal of International and Comparative Law*, 32 (2004), 585-611 (p. 588).
[41] O'Brien, *The Constitutional Systems of the Commonwealth Caribbean* (see n. 36, p. 28)

representation system.[42] Many of the conventions that underpin the British Constitution with regard to relations between the head of state and the head of government are also to be found either expressly or by reference in the Independence Constitutions.[43] Despite the heavy influence of the British version of Westminster governance, several important differences exist in the Commonwealth Caribbean constitutional adaptation, such as:

> ....the establishment of an independent ombudsman, charged with investigating the actions of government departments, their ministers, officers or MPs; the transfer of responsibility for terminating a superior judge's tenure of office from a legislative to a judicial forum; and the vesting of full control over the public service and the conduct of elections in the hands of independent commissions.[44]

Another important difference is that whereas the British Constitution is uncodified and based on the principle of parliamentary supremacy whereby "Parliament can make or unmake any law whatsoever and no person or body can override or set aside"[45] the legislation it enacts, the Commonwealth Caribbean Constitutions "were codified in a single document, which included a Bill of Rights, and which with the exception of Trinidad and Tobago, declared that the Constitution was the 'supreme law.'"[46]

Guyana presents a unique case of a departure from the shared constitutional heritage of the region, with its 1980 constitution making the declaration of establishing Guyana as a co-operative Republic, as well as provision for the appointment of an Executive President who would replace the British monarch as Head of State.[47] Except for Guyana, any deviation with regard to constitutional design between these countries is minimal. The structure of the legislature is most significant point of departure, with Dominica, Guyana, St. Kitts and Nevis and St. Vincent and the Grenadines having

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[42] Ibid.
[43] Ibid.
[44] Ibid, 31.
[45] Ibid.
[46] Ibid.
[47] Ramkarran 'Seeking a Democratic Path' (see n. 40, p. 29), p 592.

unicameral legislatures while Antigua and Barbuda, the Bahamas, Barbados, Belize, Grenada, Jamaica, St. Lucia and Trinidad and Tobago operate with bicameral legislatures.[48] Even though Dominica and St. Vincent are states with a unicameral structure, elected members sit alongside appointed 'senators' or 'representatives' in a single chamber, with both the government and opposition responsible for their selection.[49]

Several areas of concern continue to be raised in relation to the operation of the Westminster system in the Commonwealth Caribbean. In addition to the "absence of oversight committees allowing for scrutiny of public officials and ensuring transparency and accountability"[50], current constitutional arrangements indicate clear centralization of power in the hands of the Prime Minister. As Barrow-Giles explains:

> Constitutionally and legally Prime Ministers have the power to select the majority of senators in the bicameral legislature and are vested with the power to hire and fire ministers of government and appoint a wide ranging number of individuals to important political, bureaucratic, and sometimes judicial positions. Further, the inherited Westminster arrangements, unlike the American presidential prototype, do not provide for strong and effective checks on prime ministerial power. These political arrangements do not easily allow consensual government and there is a natural tendency for partisan politics to be paramount in a context of both the fusion of power and the need of the executive (the cabinet) to maintain the confidence of the legislature. It is primarily for this reason that parliament has been reduced to rubber stamping the wishes of the executive branch of government.[51]

Ten years after independence the government of Trinidad and Tobago set up a commission, chaired by a former Chief Justice of the country, Sir Hugh Wooding to

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[48] Hamid Ghany, 'The Commonwealth Caribbean: Legislatures and Democracy', in Nicholas D J Baldwin (ed.) *Legislatures of Small States: A Comparative Study* (Abingdon: Routledge, 2012), 23.
[49] Zachary Elkins, Tom Ginsburg and Justin Blount, 'Constitutional Reform in the English-Speaking Caribbean: Challenges and Prospects', Conference Paper of the Conflict Prevention and Peace Forum (January 2011), 8
[50] Cynthia Barrow-Giles, 'Regional Trends in Constitutional Developments in the Commonwealth Caribbean', Conference Paper of the Conflict Prevention and Peace Forum (January 2010), 5
[51] Ibid, 4-5.

review the constitutional provisions of that state. The Wooding Commission also advised that the Westminster political system with its powerful executive had a propensity to become transformed into dictatorship when transplanted into societies without political cultures to support its operative framework.[52] For instance, fetters on the Prime Minister operating in Britain such as a vigorous press, powerful interest groups and an alert public opinion did not operate in Trinidad and Tobago, where political culture was highly bureaucratic.[53] The colonial tradition of political involvement on the part of the "better off" had been replaced by a belief that policy making was for the government, not for the people.[54]

Furthermore, the senate has been viewed as an avenue that is used by the ruling political party as well as the Opposition party to reward their faithful supporters with appointments, or through which persons who have been defeated at the polls could be facilitated into the Cabinet on the basis of having the technocratic know-how.[55] Thus questions of relevance often dominate the discourse on how the senate functions, with the existing sentiment being that it has failed to operate in the manner intended by the drafters of the Westminster constitutions.[56] In this aspect, recommendations for reform have centred around denying the government the ability to install candidates who have been defeated during the electoral process, thereby prohibiting their access to the Executive.[57] A 1998 Barbados Constitutional Review Recommendation Report also suggested that although the bicameral structure should be maintained, there should be modification

[52] Trinidad and Tobago Parliamentary Commission Report, 'Report of the Constitution Commission (Wooding Commission Report), (22 January 1974), para. 27.
[53] Ibid, para. 31.
[54] Sir William Dale, 'Making and remaking of Commonwealth Constitutions', *Commonwealth Law Bulletin*, 19 (1993), 767-777.
[55] Barrow-Giles, 'Regional Trends in Constitutional Developments' (see n. 50, p. 31). 14-15.
[56] Ibid.
[57] Ibid.

which allows the composition of the senate to recognise Barbados as a multi-party democracy.[58]

In 2016 one of the "most significant constitutional referendums to be held in the region since independence"[59] was witnessed with voters in Grenada being asked to vote on seven separate Constitution (Amendment) Bills. These bill sought to "limit the number of terms of office a Prime Minister can serve; enhance the integrity of the electoral process; guarantee gender equality; and vest ultimate legal sovereignty in a regional appellate court, the Caribbean Court of Justice (CCJ), to replace the Judicial Committee of the Privy Council (JCPC)."[60] Despite thorough preparation in establishing the foundation for the referendum, the constitutional amendment process was unsuccessful. As O'Brien explains:

> In an outcome that surprised many in the region, including the Government of Grenada which had been carefully laying the groundwork for this referendum for many years beforehand, not one of the seven Constitution (Amendment) Bills attracted the two-thirds majority of voters that was needed to amend the Constitution. Indeed, not one of the seven Bills managed to secure even a simple majority of the voters in the referendum.[61]

According to O'Brien, this two-thirds majority requirement was actually designed to preserve the Westminster framed system of governance - "the inclusion of such an impossibly high threshold was a colonial legacy included in the independence Constitution with the intention of preserving in perpetuity the system of government inherited from the former colonial power."[62] Commenting on what could have caused the failure of 2016 process in Grenada, Antoine avoids blaming the people of that country for not wanting constitutional reform, but instead blames the political nature of referendums in the region. Accordingly she states:

> I don't believe that when Grenada voted against the referenda which included the right to potable water – that it means that they don't want potable water….Of course they want it. Referenda are…..a very troublesome thing in the Caribbean. I don't think from those experiences [such as the 2016 Grenada

[58] Barbados Constitution Review Commission, *Report of the Constitution Review Commission* (Bridgetown: Government Printing Department, 1998).
[59] Derek O'Brien, 'Developments in the Commonwealth Caribbean: The year 2016 in review', *International Journal of Constitutional Law*, (2017) Vol. 15, No. 2, 506–514, (p. 508).
[60] Ibid., 507.
[61] Ibid.
[62] Ibid., 514.

> referendum] we can take away that the people don't want more rights in terms of economic, social and cultural rights.[63]

As such, Antoine argues that the failure of the 2016 constitutional reform process in Grenada would have been influenced more by politics than the lack of public will for constitutional reform. The referendum process in itself could be a block to constitutional amendments, as historically, the region has had a track record of failed results in referenda bringing about constitutional reform. Since independence, "only one Government has managed to secure the support of a majority of voters in a referendum for constitutional reform and that was the Government of Guyana in 1980 in a referendum that was widely believed to have been rigged."[64] O'Brien also points out the referendum process being a hindrance for the making of important constitutional decisions in the region, such as whether to replace a constitutional monarchy with non-executive presidential republicanism in Jamaica, as even where there is support by the Opposition party, "removing the Queen will involve an amendment of one of the Constitution's 'specially entrenched' provisions and will, therefore, require, in addition, the approval of a majority of Jamaica's citizens in a referendum."[65]

Writing on St. Vincent & the Grenadines, Bishop also alludes to the adversarial nature of politics which is "driven by the insular nature of island life" and which forms a "vitriolic partisan political system."[66] On this point, he states that this situation is not only limited to that country, but to the entire region:

> Although it has often been argued that insularity and the Westminster system have also helped to maintain democratic stability in what are intrinsically fragile polities…..the ferocious and divisive debate - both within the Houses of Assembly and, outside, in the press and among the electorate—has become corrosive. Such vitriol conceals often limited ideological differences between the respective outlooks of the dominant political parties, and it consequently reproduces blind partisanship among the electorate, in turn reducing parliaments to little more than 'vacuous arenas of political conflict'[67]

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[63] Rose-Marie Belle Antoine, 'Conversations on Distinguished Jurist Lecture', in Judicial Education Institute of Trinidad and Tobago (ed.) *The Rule of Law v Rulings by Laws: Promoting Development in Caribbean Societies: Seventh Distinguished Jurist Lecture 2017* (Port-of-Spain: JEITT, 2018), 41-61, (p. 53).
[64] Derek O'Brien, 'Developments in the Commonwealth Caribbean: The year 2016 in review', *International Journal of Constitutional Law*, (2017) Vol. 15, No. 2, April 2017, 506–514, (p. 508).
[65] Ibid.
[66] Matthew Bishop, 'Slaying the "Westmonster" in the Caribbean? Constitutional Reform in St Vincent and the Grenadines', *The British Journal of Politics and International Relations*, 13 (2011) 427-437, (p. 425).
[67] Ibid.

Bishop attributes this practice of blind partisanship as a contributing factor to the failure of constitutional change in St. Vincent & the Grenadines, and particularly in relation to the constitutional reform process of 2009, where a new constitution was rejected at the referendum stage.[68] Proposed reforms included the "removal of the British monarch as head of state, reform of the legislature, the electoral system, the executive and its relationship with the bureaucracy, and a host of other measures related to cleaning up finance."[69] A lack of co-operation from the opposition and its suggestion that the reforms were being driven by authoritarian tendencies of the Prime Minister, meant that "the referendum was being utilised largely as political bellwether for the 2010 general elections."[70] Bishop contends that the constitutional reform process in itself transformed from one of inclusivity which characterized its early stages, to "a marked narrowness in terms of 'who else' would have access to power."[71] Bishop felt that while the bill which sought to reform the constitution might have helped to improve governance such as through the creation of new institutions of government oversight, its provisions were "insufficient to alter radically the country's politics in such a way as to genuinely transcend the limitations of Westministerism."[72]

The most recent attempts to reform Jamaica's constitution have also come under scrutiny. The 2011 Charter of Fundamental Rights and Freedoms[73] (the Charter), has been described by O'Brien as "a rather curious example of constitutional reform."[74] The Charter contains what may be regarded as progressive features, such as increasing the number of protected rights to include the right to vote, the right to a healthy and productive environment, the right to free primary school education, the right to a passport, and the right to free, humane treatment.[75] It also builds on the protection of already existing rights including freedom of the person, property rights, due process, and removing the immunity which prohibited constitutional challenges for Acts of Parliament which have achieved a special majority.[76] However, as O'Brien goes on to explain:

> On the other hand, it contains a cluster of provisions relating to the death penalty, equality and laws criminalising homosexuality and abortion, which are

[68] Ibid., 431-434.
[69] Ibid., 428.
[70] Ibid., 430.
[71] Ibid., 432.
[72] Ibid., 433.
[73] Jamaica Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011.
[74] Derek O'Brien, *The Constitutional Systems of the Commonwealth Caribbean: A Contextual Analysis* (London: Bloomsbury Publishing, 2014), 275.
[75] Ibid.
[76] Ibid.

> profoundly reactionary, not only in maintaining the status quo, but effectively entrenching it. Thus, for example, section 13(8) of the Charter provides that neither inordinate delay nor the conditions in which a condemned man is detained no matter how inhumane, will be sufficient grounds to challenge the constitutionality of the execution of a death sentence. Moreover, by virtue of section 13(12) existing laws relating to the sexual offences, including those which criminalise homosexuality and abortion, are rendered immune from constitutional challenge, while the equality provisions contained in Section 13(3) have been drafted in such a way as to exclude any possibility of sexual orientation being a prohibited ground of discrimination.[77]

What O'Brien's narrative suggests is the maintenance of the status quo is necessary to maintain political support. On this point, Hope describes the presence in that country of a political system with a patron-clientist structure "marked by strong partisan party loyalties, garrison constituencies and political violence, particularly among the urban poor."[78] She cites Stone's perspective that the core of this system is "the exchange of economic and social favours to a poor and socially fragmented population in return for support."[79] According to Stone, efforts by political parties to assert their hegemony are mainly successful in areas where "poverty, urban ghetto conditions, careful placement of party hard-core through government controlled housing schemes and tight local organizations"[80] exist, with this hegemony used to establish "a community majority of emotionally intense party militants tied to the patron-broker-client machine"[81] known as the 'garrison.' As, such, Hope explains that "any significant social, political, economic or cultural development within the garrison can only take place with the tacit approval of the leadership (whether local or national) of the dominant party."[82] In the early independence period, attempts were made to reform how the country was governed by Norman Manley and his People's National Party (PNP) government. During the 1970's the PNP under Manley moved away from its centrist views, and adopted a more left-wing political ideology. Manley attempted to adopt a governance model of democratic socialism, seeking to establish measures to redistribute the economic gains that the country had previously made, and end Jamaica's reliance on foreign companies.[83] The

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[77] Ibid.
[78] Donna P. Hope, *Inna di Dancehall: Popular Culture and the Politics of Identity in Jamaica* (Kingston: UWI Press, 2006), 3.
[79] Carl Stone, *Democracy and Clientelism in Jamaica* (New Brunswick, NJ: Transaction Books, 1980), 91–92.
[80] Ibid., 101.
[81] Ibid., 100.
[82] Donna P. Hope, *Inna di Dancehall: Popular Culture and the Politics of Identity in Jamaica* (Kingston: UWI Press, 2006), 3.
[83] Ibid., 2.

PNP proceeded to place "controls on trade, ceased foreign debt payment for a period of eighteen months, reduced wage growth and sought aid from sympathetic left-wing governments."[84] Manley's plan was however largely unsuccessful, and according to Hope, his "socialist dream and his ambitious policies failed due to grandiose schemes for governmental expansion, external political pressures caused by his socialist rhetoric and poor implementation of the proposed programmes."[85] Hope further explains that structural adjustment policies of the International Monetary Fund (IMF) and World Bank "heralded the end of the democratic socialist dream pioneered under the 1970's political regime of the Manley government"[86] and a provided Jamaica with a "harsh initiation into the unequal workings of global capitalism."[87]

Perkins argues that the collapse of Manley's vision of democratic socialism was not insulated from the effects of the Grenada revolution, with the proclamation in Grenada of the People's Revolutionary Government (PRG) in 1979, and its subsequent coming to an end in 1983. The Grenada revolution was the first "extra-constitutional removal of a government in the British West Indies – and therein lay the problem."[88] Whereas most Caribbean governments immediately recognized Maurice Bishop's revolutionary regime, "they wanted it legitimized according to the Westminster model" and this was strongly opposed by Bishop.[89] As Perkins explains, two centuries of "British parliamentarianism had been overturned and perhaps this fact, more than any other aspect of the revolution, is what terrified Grenada's neighbours throughout the Caribbean."[90] Perkins suggests that at the time, like Europe and the United States, the Caribbean had move to "a kind of neo-Toryism"[91] and nowhere "was this more evident than in the defeat of Michael Manley's democratic socialism in Jamaica in 1980."[92] He further contends that the subjective conditions of the Grenada revolution were unable to be transformed because of the failure of Bishop's New Jewel Movement (NJM) to resolve its internal conflicts, and as a result the working class had felt betrayed by their leaders.[93] Perkins also contends that the objective conditions of the Grenada revolution could not

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[84] Ibid.
[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] William Eric Perkins, 'Requiem for Revolution: Perspectives in the U.S./OECS Intervention in Grenada', *Contributions in Black Studies*: Vol. 7, Article 2, 2-21, (p. 10).
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid., 13.

be met – "The duty of the revolutionary party was to accelerate the objective conditions for the economic transition to socialism, while educating the masses ideologically to carry through the transition."[94] In the absence of these factors, the revolution was unsuccessful, and the Westminster modelled system was only temporarily suspended.

The case has also been argued that the constitutional review process has been characterized by a lack of political will which has resulted in insufficient public education and by extension a lack of public interest.[95] It appears as though comprehensive constitutional reform is often met with an abject response by politicians in their efforts to maintain power.[96] Constitutional privileges enjoyed by those politicians comprising the ruling political party would no doubt be uneasily forfeited, even though the provisions allowing for privilege may be contrary to the public good. Where constitutional reform would result in increased executive power for the state, thereby allowing more control of the state, then the political party comprising the government may attempt to encourage reform measures.[97] Alternatively, where the political party which formed the government is ousted and assumes the role of the opposition, then calls for overall constitutional reform would be advocated.[98] Indeed, the current position with regard voting arrangements is proficiently espoused by Trotman-Joseph, who has stated:

> Taking a hard look at the effectiveness of the Westminster Constitutions adopted by the Commonwealth Caribbean states, it may be mooted that the winner takes all system is a *de facto* system of 'tyranny of the majority.' But for all this, no submissions are being made *en masse* to regional constitutional review commissions that would require that the system be fundamentally changed.[99]

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[94] Ibid., 7.
[95] Avril Trotman-Joseph, 'Constitutional Review in the Caribbean', *European Journal of Law* Reform, 12:1-2 (2010), 134-144, (p. 140).
[96] Ibid, 144.
[97] Ibid.
[98] Ibid.
[99] Ibid, 143.

A modern day approach to constitutional reform should ideally also concentrate on how the language in the document, whereby the "man on the street," young adults and children would be able to understand how the words are put together and what is intended to be achieved. Language in many ways a reflection of certain underlying ideologies within a society, and it is on this basis that calls have been made for changing the gender biased language contained in existing regional constitutions, based on the premise that language which excludes females and gives unequal treatment to both males and females perpetuates a society in which men regard and treat women as lesser individuals to themselves.[100]

Both de Smith and Nwabueze regard the failure of Westminster derived constitutionalism as not being derived from defects from within the system itself, but instead from societal defects which have been responsible for both implementing and corrupting the system. De Smith for instance, states that "In developing countries, constitutional factors will seldom play a dominant role in the shaping of political history."[101] This assertion is based on de Smith putting forward justifications such as colonial rule demonstrated that governance could exist without popular consent; the temptation of power for nationalists who secured independence; and the divisive nature of societies that experienced communal conflicts such as racial, linguistic and religious conflict as a result of various groups pursuing a common goal of power.[102] Nwabuze places more emphasis on corruption and the abuse of privilege by those in public office, especially by referring to the creation of a situation whereby the government is the main employer of the land, thereby facilitating the opportunity to provide friends and relatives

[100] Ibid, 137.
[101] Stanley Alexander de Smith, *The New Commonwealth and its Constitution* (London: Stevens & Sons, 1964), 83.
[102] Benjamin O. Nwabueze and SA de Smith (foreword), *Constitutionalism in the Emergent States* (London: Hurst,1973), ix.

with employment and various other contracts for their monetary and other benefits.[103] Justification along the lines that societal defects have led to failure of the Westminster framework may also find support in the notion that the development of a psychological dependency as a consequence of colonialism contributed to a complex sentiment of inadequacy amongst the former Commonwealth Caribbean colonies. In this context, the movement towards independence has been considered as not seeking to inculcate a nationalist sentiment and sense of West Indian identity as an alternative to those cultures lost during colonialism, but rather a movement to bring about economic independence.[104] Alternatively, the idea that the Westminster model could be transferred and established overseas has been rejected by Madden, who argues that "the only true Westminster model remained inevitably at home in Westminster" and the intention was never for this to be exported, but to strictly "be consumed only on the premises."[105] Although Madden does not address the question of what system was indeed exported, he states:

> The new generation of constitution makers in the 1950's and 1960's were not concerned with creating a permanent instrument for the government so much as a device for securing independence which could be altered subsequently at will. Something akin to the British model might serve its temporary purpose in allaying fears in Britain about transferring power. But it remains to be proved that it is appropriate for the tasks of self-government anywhere else than in Britain.[106]

Nonetheless, it is suggested that the operation of functions which are predicated on the Westminster modelled system has engendered certain deficiencies in its ability to address the requirements of the Commonwealth Caribbean society. As Bishop explains:

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[103] Ibid, 301.
[104] Tony Thorndike, 'The Political Economy of independence of the former Associated States of the Commonwealth Caribbean' in Paul K Sutton (ed.) *Dual Legacies in the contemporary Caribbean : Continuing aspects of British and French Dominion* (London: Frank Cass & Co. Ltd, 1986), 145.
[105] Frederick Madden, 'Not for Export, The Westminster Model of Government and British Colonial Practice', *The Journal of Imperial and Commonwealth History* 8.1 (1979), 10-29, (p. 24).
[106] Ibid.

> ....the end result is poor governance with a range of practical consequences, from an inability to safeguard basic principles of democracy, to a state that is ill-equipped to construct the kind of institutions necessary to deal with the myriad of problems - particularly those emanating from the global arena such as drug trafficking, global economic restructuring and environmental degradation - with which tiny Caribbean societies today have to grapple.[107]

Further to questions of relevance of the Westminster system in the Commonwealth Caribbean are also questions of the continued retention of the Judicial Committee of the Privy Council (JCPC) by some states within the region. This will now be looked at, particularly in relation to its role regarding the understanding of 'savings law' clauses and the regional death penalty jurisprudence.

4. Retention of the Judicial Committee of the Privy Council

In the earlier years of British rule, parties were able to appeal decisions of the lower courts by referring the matter to the Sovereign, who would then refer it to the Privy Council, a judicial entity formed of legal practitioners and scholars.[108] The Privy Council found its jurisdiction originating at the time of the Norman Conquest and was based on the ideology that "The King is the fountain of all justice throughout his Dominions, and exercises jurisdiction in his Council, which act in an advisory capacity to the crown."[109] As the appeals process evolved, the establishment of a Judicial Committee of the Privy Council (JCPC) in 1833 by the Judicial Committee Act created a dedicated body assigned

[107] Matthew Bishop, 'Slaying the "Westmonster" in the Caribbean? Constitutional Reform in St Vincent and the Grenadines', *The British Journal of Politics and International Relations*, 13(2011) 427-437, (p. 428).
[108] Ezekiel Rediker, 'Courts of Appeal and Colonialism in the British Caribbean: A Case for the Caribbean Court of Justice', *Michigan Journal of International Law*, 35 (2013), 213-251, (p. 221).
[109] See The Judicial Committee of the Privy Council, "History" <https://www.jcpc.uk/about/history.html > [accessed 5 September 2014].

to handle appeals specifically from the colonies. The 1833 Act defined the Membership of the Judicial Committee and sought to regulate its jurisdiction and procedure.

The continued retention of the JCPC as a final appellate court in all Commonwealth Caribbean territories, but for Barbados, Belize and Guyana,[110] may be likened to an institutional remnant of the colonial era. McIntosh has argued that the "continuing presence of the Crown and its Judicial Committee in the post-independence Commonwealth Caribbean political order represents a vestigial incongruity, a contradiction in the constitutional symbolism of a politically independent sovereign order."[111] In a post-colonial situation, the reality remains that retaining appeals to the JCPC means keeping hold of an institution in which a diverse West Indian society has no influence over matters such as the composition and tenure of judges, rules of the court and future plans for the court. Grounds for concern continue to be raised by many, for instance Justice Saunders of the Caribbean Court of Justice (CCJ) who has commented:

> A remarkable homogeneity has existed among the Law Lords (of the JCPC). Save for Baroness Hale who was appointed in 2003, they have all been white and male and appointed in their 50's or early 60's. They have all been raised in comfortable middle or upper middle class backgrounds, all educated privately and the great majority of them would have spent their working lives as members of the Bar in London before joining the Bench.[112]

Retaining the JCPC as opposed to adopting the appellate jurisdiction of the CCJ raises questions on the self-confidence of states and the absence of realisation of an identity of self. McIntosh for instance, laments that the experience of colonial imperialism had engrained in the West Indian consciousness a negative perception of self.[113] There

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[110] O'Brien, *The Constitutional Systems of the Commonwealth Caribbean* (see n. 36, p. 28), 194.
[111] Simeon McIntosh, *Caribbean Constitutional Reform: Rethinking the West Indian Polity* (Kingston: The Caribbean Law Publishing Company, 2002), 64.
[112] Honourable Mr. Justice Saunders JCCJ, 'The fear of cutting the umbilical cord ...the relevance of the Privy Council in Post Independent West Indian Nation States', 2nd Annual Eugene Dupuch Distinguished Lecture (Nassau, Bahamas) (22 January 2010).
[113] McIntosh, *Caribbean Constitutional Reform* (see n. 111, p. 42), 36-37.

should be concern that such notion creates discernment outside of the region in terms of perceptions of how the regional judicial, legal and governance systems function. Lord Anderson of Swansea for instance has stated that the credibility of the CCJ was "enhanced by the fact that a British judge and a Dutch judge serve on it."[114] As will also be discussed, there exists a conflict between the JCPC and certain Commonwealth Caribbean governments over the administration of the death penalty.

5. The problem of the 'savings law' clause in judicial constitutional review

The power of the courts when it comes to constitutional review is restricted by the inclusion of 'savings law' clauses in the Independence Constitutions. Although savings clauses may not necessarily be drafted in the same form across the region, its intention is to continue with the applicability of specific laws that preceded independence, despite the reality that these laws may violate constitutional rules which protect fundamental rights.[115] An example is the savings clause which is found in Section 26(8) of the Jamaican Constitution, which reads:

> Nothing contained in any law in force immediately before (the date of independence) shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.

Savings law clauses are of two categories, namely the 'partial' savings clause which preserve all forms of punishment that were considered to be lawful prior to independence and the 'general' savings law clause. As O'Brien notes, "partial savings clauses can be found in all the early Commonwealth Caribbean Constitutions, and it was not until the Constitutions of St. Vincent and Dominica were enacted in 1978 that the

[114] HL Deb 26 October 2009, vol 713, col 971.
[115] O'Brien, *The Constitutional Systems of the Commonwealth Caribbean* (see n. 36, p. 28), 229.

drafters finally saw it fit to dispense with such a clause."[116] General savings law clauses provide an even more extensive protection of pre-independence laws in that they afford "immunity from constitutional challenge to all laws that were in force at the time of independence."[117] In describing the general idea behind savings law clauses, O'Brien explains:

> ...the inclusion of a partial savings law clause anticipated a potential inconsistency between forms of punishment, such as the death penalty and judicial flogging, which were still widely enforced across the region, and the constitutional right not to be subjected to torture or to inhuman or degrading punishment or other treatment. General saving clauses, on the other hand, were intended to afford a measure of stability in the period of transition from colonial rule to independence. Governments in the region needed to be sure that they had some laws in place upon which they could rely as they embarked upon independence....The Bills of Rights contained in the Commonwealth Caribbean constitutions were thus intended to guard against the dangers that lay in the future; to prevent the governments of these newly independent countries from infringing the rights that had been enjoyed by their citizens prior to independence. It was not countenanced at the time of independence that their citizens' rights might also be infringed by existing laws or existing forms of punishment.[118]

Following independence, a legal fiction relating to a presumption of Constitutionality therefore developed. This presumption is that the court, if possible, is required to construe the language of a statute "as subject to an implied term which avoids conflict with any constitutional limitations."[119] Furthermore, there is the assumption that a statute is constitutional unless it has been proven to be unconstitutional "and the burden on the party seeking to prove that a statute is unconstitutional is a heavy one."[120] This

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[116] Ibid, 229-230.
[117] Ibid, 230.
[118] Ibid.
[119] Jason Jones v Attorney General of Trinidad and Tobago [2018] HC Claim No CV2017-00720, [39.1].
[120] Ibid, [39.2].

notion was explained at the Judicial Committee of the Privy Council (JCPC) in *DPP v. Nasralla* by Lord Devlin, whose judgment stated:

> To obtain redress under Chapter III of the Constitution the applicant has to show that his fundamental rights have been or are likely to be infringed and he cannot show this if his whole case rests on a procedural fault that could easily be put right.....This Chapter, as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall, in any matter which the Chapter covers derogates from the rights which at the coming into force of the Constitution the individual enjoyed.[121]

The guidance issued by the JCPC in *Nasralla* meant that local courts thus adopted the position that the rights guaranteed by the Constitution were the same as those which had already been secured by existing laws, which were inherently presumed to be constitutional. Following *Nasralla* however, the JCPC in *Minister of Home Affairs v. Fisher*[122] attempted to shift from the presumption of constitutionality to a more purposive approach. In this case the JCPC upheld a decision by the Bermuda Court of Appeal that the word 'child' in section 11(5) of its Constitution should be given a broad interpretation so as to include both those children who were born out of wedlock, as well as those born in wedlock. Lord Wilberforce, in delivering the judgment of the JCPC advised:

> Chapter I is headed "Protection of Fundamental Rights and Freedoms of the Individual." It is known that this chapter. as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the Constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). That Convention was signed and ratified

[121] *DPP v Patrick Nasralla (Jamaica)* [1967] UKPC 3, [1967] 2 AC 238, pp 247-248,
[122] *Minister of Home Affairs v Fisher (Bermuda)*[1979] UKPC 21, [1980] AC 319

> by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations' Universal Declaration of Human Rights of 1948. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to…[123]

However, despite the suggestion by Lord Wilberforce of this 'purposive' approach, as Barrow-Giles explains, 'savings' clauses in making provisions for exceptions to those rights which are enshrined in the Constitution "serve to weaken and create ambiguity about fundamental rights under Caribbean constitutions." In *Jason Jones v. Attorney General of Trinidad and Tobago*[124] Justice Rampersad suggested that the word 'presumption' should be "deleted and totally eradicated from the constitutional legal vocabulary."[125] He took the position that instead of starting from a presumption, in all circumstances each case should be looked at individually with due consideration to the constitutional provisions applicable to that particular case. Furthermore, he suggested:

> it is this court's respectful view that the time has long passed for a review of the function of the savings clause in a jurisdiction in which the Constitution is supreme. The sad reality, however is that the very noble intention that was intended to be addressed by the Constitution has been rendered powerless in the face of the savings clause in so far as it relates to provisions falling under that section. Instead, citizens are left to the machinations of politics and political expediency and political, rather than necessarily constitutional, decisions....[126]

In *Jones*, the Trinidad and Tobago High Court considered the constitutionality of the offences of 'buggery' and 'acts of serious indecency' as defined under the Sexual

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[123] Ibid, 328
[124] *Jason Jones v Attorney General of Trinidad and Tobago* [2018] HC Claim No CV2017-00720 (see n. 119, p. 44)
[125] Ibid, [47]
[126] Ibid.

Offences Act[127] of that country. Section 13 of the Act creates the criminal offence of "buggery" for which a person is liable on conviction to imprisonment for twenty-five years. This section defines "buggery" as "sexual intercourse per anum by a male person with a male person or by a male person with a female person." In addition, Section 16 of the Sexual Offences Act legislates that a person who commits an "act of serious indecency" is liable to imprisonment for five years. This section proceeds to define "an act of serious indecency" as an act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of the genital organ for the purpose of arousing or gratifying sexual desire. Justice Rampersad in his judgment conveyed that historically, these offences were "born out of the Christian church's patriarchal moral jurisdiction and yielded, and continues to yield, serious consequences statutorily."[128] In considering the historical criminalization of same-sex activity by English law, he explained that Trinidad and Tobago, like other colonies under British rule, had been subject to transplanted law.[129] In this regard, historical, now archaic English laws which deemed homosexuality to be a criminal offence had found its way into domestic legislation during the colonial period, and continued to be maintained. In circumventing the application of the savings law clause, Justice Rampersad took the position that Parliament displayed a step away from the presumption of constitutionality imposed by the savings law clause through changes in the Act in the post-Independence period - "sections of the Act afresh in light of the Republican Constitution."[130] For example, the old colonial offence of 'gross indecency' had been replaced by provisions for 'serious indecency.' [131] Accordingly, Justice Rampersad advised:

[127] Trinidad and Tobago Sexual Offences Act 1986 Chapter 11:28
[128] *Jones* (see n. 119, p. 44), [32].
[129] Ibid, [29].
[130] Ibid, [68].
[131] Ibid, [71].

> From the very outset, the legislators have sought not to re-enact, but to repeal and replace the laws of Trinidad and Tobago relating to sexual crimes. To my mind, there is therefore no need to try to strain the meaning of the words used to bring the provisions of the Act under the auspices of the savings clause....If Parliament had intended to re-enact the laws, as provided under section 6 of the Constitution, then it would not have sought to use the word "repeal and replace" but would have used the words "repeal and re-enact."..... "Re-enact", in this context connotes a step to re-establish and recognize as continuing to exist previous provisions relating to sexual crimes which are being re-introduced into force by the new Act. On the other hand, "replace" connotes something new being introduced and enacted instead of what existed before.[132]

The court thus suggested that where there is "a radical change in the legislation and a deliberate decision to derogate from the rights of citizens as recognized and sanctioned"[133] the presumption of constitutionality would no longer be applicable. Notwithstanding the judgment in *Jones*, savings law clauses continue to provide protection for the legislative preservation of the death penalty. Arguably, in terms of the death penalty, what the savings law clause does is to constitutionally preserve a practice that existed pre-independence, with no acknowledgment of human rights standards in a modern day context.

Attempts to enforce the death penalty by regional governments have been met with circumventions by the JCPC, and have often created tension, with the jurisprudence in this area mainly being defined by the JCPC. In matters relating to the carrying out of the death penalty, the JCPC has focused on two procedural issues, being the length of time that is allowed to elapse between when the person is sentenced to death and when the actual execution takes place; and whether the death penalty is mandatory in instances of a conviction of capital murder. Constitutional issues surrounding the death penalty

[132] Ibid, [62]-[63].
[133] Ibid, [68]

were first brought to the attention of the JCPC in the 1970's. In *De Freitas v Benny*,[134] although the death penalty was upheld, the defendant argued that capital punishment amounted to cruel and unusual punishment, and that a substantial lapse of time would make it unconstitutional to carry out the execution. The JCPC in *Abbot v Attorney General of Trinidad and Tobago*,[135] again upheld the death sentence, but stated that a delay of six years between sentencing and execution brought the administration of criminal justice into disrepute among law abiding citizens. Although the JCPC did not hold that six years would qualify as a substantial delay, the court emphasised that there should not be an enormous time lapse between sentencing and execution. Dissenting opinions in the 1983 judgment of *Riley v Attorney-General of Jamaica*[136] began to pave the way for the JCPC to delve deeper into the issue of the death penalty as a matter for constitutional concern. While the JCPC in this matter held that delay on its own was not sufficient ground for deeming an execution unconstitutional, dissenting judges Lord Scarman and Lord Brightman adopted the position that prolonged delay brought about by factors beyond the control of the convicted man can render a death sentence as being a form of inhuman and degrading punishment.[137]

The regional jurisprudence in this area further evolved in the landmark judgment of *Pratt and Morgan v Attorney General for Jamaica*[138] where the appellants argued that a fourteen year delay during which they were held in subhuman prison conditions violated Section 17(1) of the Constitution of Jamaica, which prohibited inhumane and degrading punishment. The defendants also were read death warrants on three occasions while being moved to cells situated close to the gallows in anticipation of execution.[139] The

[134] *De Freitas v Benny (Trinidad and Tobago)* [1975] UKPC 12, [1976] AC 239.
[135] *Abbot v Attorney General of Trinidad and Tobago* [1979] UKPC 15, [1979] 1 WLR 1342.
[136] *Riley v Attorney-General of Jamaica* [1982] UKPC 23,[1983] 1 AC 719.
[137] Ibid, 736.
[138] Pratt and Morgan v Attorney General for Jamaica [1993] UKPC 37, [1994] 2 AC 1.
[139] Ibid, 1.

defendants were able to pursue appeals through various international tribunals such as the Inter American Commission on Human Rights (IACHR) and the United Nations Human Rights Committee (UNHRC) which monitors the International Covenant on Civil and Political Rights (ICCPR).[140] The IACHR took the position that unfairly enduring over four years on death row violated Article 5(2) of the American Convention which prohibited torture and ill treatment.[141] The UNHRC found that a delay of forty-five months by the Jamaica Court of Appeal in delivering their reasons had amounted to a violation of Article 14 para. 3(c) and Article 14 para. 5 of the ICCPR which guarantees the right of a person to be tried without undue delay, and the right of the convicted person to have his conviction and sentence reviewed by a higher tribunal according to law.[142] The JCPC appeared to build on its previous jurisprudence by deciding that there was an unconscionable delay in carrying out the death penalty which breached Section 17(1) of the Jamaican Constitution.[143] The JCPC commuted the sentences to life imprisonment and established a period of two years for completing the appellate process, with national courts having twelve months to hear an appeal following conviction, followed by twelve months allocated for an appeal to the JCPC.[144] The JCPC also established a five year period between sentencing and execution, which would also consider the time taken for appeals to be conducted.[145] Judgments emerging after the decision of the JCPC in *Pratt* such as in *Guerra v Baptiste*[146] ruled that the five year limit was not restrictive and that cases should be considered on an individual basis. In this instance, the delay was four years and ten months, but the JCPC still held that this delay amounted to cruel and unusual punishment, in violation of the Trinidad and Tobago constitution. Similarly, the JCPC in

[140] United Nations International Covenant on Civil and Political Rights, 999 UNTS 171 (ICCPR)
[141] *Pratt* (see n. 138, p. 49), 10-11.
[142] Ibid, 12.
[143] Ibid, 19 -24.
[144] Ibid, 25.
[145] Ibid, 26.
[146] *Guerra v Baptiste* [1995] UKPC 3.

Henfield and Farrington v Attorney General of the Bahamas[147] held that that a delay of three and a half years could also violate the constitution of the Bahamas.

Adopting an exceptionally legalistic approach, various Caribbean governments tried to restrict recourse by defendants to international human rights hearings. Jamaica and Trinidad and Tobago for instance responded by withdrawing from the First Optional Protocol to the ICCPR which allows for the UNHRC to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by a State Party. Governments in the region have also sought justification for maintaining the death penalty by pointing to Article 6(2) of the International Covenant on Civil and Political Rights (ICCPR), which states, "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court." Alternatively however, the West Indian approach in preserving the death penalty seems archaic and not in alignment with international developments. The United Nations Human Rights Council (UNHCR) in its First General Comment on Article 6 of the ICCPR stated its position that certain aspect of that article "strongly suggest that abolition is desirable." Preceding this was the position of the United Nations Commission on Human Rights (UNCHR) which had frequently passed resolutions calling for states to abolish the death penalty, while drawing attention to the fact that an increasing number of states had in fact prohibited this practice. Neither have regional government been substantially persuaded by the decision not to

[147] *Henfield and Farrington v AG of the Bahamas* [1996] UKPC 4, (1996) 49 WIR 1.

incorporate the death penalty as a possible sentence by the International Criminal Court under the Rome Statute.

The United Kingdom has also attempted to exert pressure on regional governments to abolish capital punishment. In 1991, Britain abolished capital punishment in its five dependent territories in the Caribbean, namely Anguilla, British Virgin Islands, the Cayman Islands, Montserrat and the Turks and Caicos Islands. Additional pressure from the international community followed in 1998 when the European Union (EU) prioritized the worldwide abolition of capital punishment as a matter of foreign policy importance. The EU attempted to assist with reform and offered funding for a legal assistance project aimed towards death row prisoners in the Caribbean. This offer was met with united resistance across the region, with CARICOM strongly opposing what they viewed as an attempt to link the abolition of capital punishment to the provision of monetary aid.[148]

6. Progress of Economic, Social and Cultural Rights since Independence

This section will consider how the rule of law has developed in light of economic, social and cultural (ESC) factors operating within the Commonwealth Caribbean. Amongst the countries in region, only Belize, Guyana, and Grenada have specifically referenced economic, social and cultural rights in their Constitutions. The view exists that legal theory arguably faces constraints when it is "entangled with the shifting and unruly facts of international politics, economics and social justice."[149] However, this is particularly problematic where the development of the law has failed to address forms of

[148] Laurence R. Hefler, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes', *Columbia Law Review*, 102: 7 (2002), 1832-1911, (p. 1897).
[149] Oscar Schachter, 'The Evolving International Law of Development', *Columbia Journal of Transnational Law*, 15:1 (1976), 1–16, (p. 1).

discrimination in the ESC sphere. In the *Maya Leaders Alliance* case for example, the CCJ explained that "the right to protection of the law is "a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law." …[It] can be engaged by the failure of the State to secure and ensure the enjoyment of constitutional rights.[150] Nonetheless, as will be discussed, Commonwealth Caribbean states have generally avoided expressly incorporating provisions directly addressing ESC rights into their constitutions.

Treatment of ESC rights in the Commonwealth Caribbean

In 1997 the CARICOM Heads of Government agreed to the Charter of Civil Society[151], which recognises a wide range of civil, political, economic, social, and cultural rights. For instance, the Charter inter alia recognizes the rights of indigenous peoples[152]; women's rights such as the right to equal opportunities for employment and compensation as well as legal protection and remedies for domestic violence, sexual abuse and sexual harassment[153]; children's rights such as protection against economic or other exploitation, neglect or abuse including sexual abuse[154] and also the right of disabled persons to non-discrimination and equal opportunities[155] as well as the right to access education and training including special education for children with disabilities.[156] While these provisions are notable for their attention to ESC rights, compliance is not mandatory, and the Charter's contents are therefore non-binding, As such, Article XXVI merely states that "The States declare their resolve to pay due regard to the provisions of this Charter." In this regard, Berry explains, that "the status of the Charter, despite the strong mandatory

[150] *The Maya Leaders Alliance et. al. v the Attorney General of Belize* [2015] CCJ 15 (AJ) at [47].
[151] CARICOM Secretariat, *Charter of Civil Society* (Georgetown: CARICOM Secretariat, 1997).
[152] Ibid., Article XI.
[153] Ibid., Article XII.
[154] Ibid., Article XIII.
[155] Ibid., Article XIV.
[156] Ibid., Article XV.

language seen in many of its provisions, remains non-binding and this impairs its overall effectiveness."[157]

The Guyana constitution is the only Commonwealth Caribbean constitution where a range of economic, social and cultural rights are expressly addressed in Chapter II, Articles 9-39, which is titled 'Principles and Bases of the Political, Economic and Social System.' This Chapter of the Guyana constitution focuses on a range of areas relevant to ESC rights including the right to medical attention and social care in case of old age and disability; duty to improve the environment; right to housing; right to education and equality for women and national co-operation for development of economy. Yet, despite the existence of these constitutional provisions, Justice Nelson explains the shortfalls of the Guyana constitution in its consideration of ESC rights:

> Section 39(1) of the Guyana Constitution, however, states that the directive principles are for the guidance of inter alia, Parliament, the Government and the courts, but have no direct legal force. To add to this cynicism, certain key international human rights treaties, including the ICESC, are directly incorporated into the Guyana Constitution except where covered by the fundamental rights section. The State is only required to take reasonable measures within its available resources to achieve the progressive realization of those rights: section 154A(3). Faced with an attitude of keeping economic, social and cultural rights at arm's length, one can well expect that judges who are not elected by the people would be reluctant to read into Constitutions positive obligations on the State.[158]

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[157] David Berry, *Caribbean Integration* Law (Oxford: Oxford University Press, 2014), 94.
[158] Justice Rolston Nelson, 'Comments on Distinguished Jurist Lecture', in Judicial Education Institute of Trinidad and Tobago (ed.) *The Rule of Law v Rulings by Laws: Promoting Development in Caribbean Societies: Seventh Distinguished Jurist Lecture 2017* (Port-of-Spain: JEITT, 2018), 68-74, (p. 72).

Positive obligations on the state in terms of ESC rights are also restricted in the constitutions of other countries in the region, although there might exist some hint of it. For example, the Constitution of Belize appears to recognize the right to work, with section 15 stating that no person "shall be denied the opportunity to gain his living by work which he freely chooses or accepts, whether by pursuing a profession or occupation or by engaging in a trade or business, or otherwise." In addition, the Jamaica Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011includes the right to state funded public education at the pre-primary and primary levels for every child who is a citizen of Jamaica.

Other than the above mentioned provisions, both state and public responses to ESC rights have been abject in other countries within the region. In the Bahamas, the Constitutional Commission appeared to be averse to recommending any revisions which provided for social and economic rights. Accordingly, the commission stated:

> The Commission does not recommend the inclusion of social and economic rights (so called "second-generation" rights) such as food, shelter, water, work, education) among the enumerated rights in Chapter 2. As these rights are universally declared to be progressively achievable, or realizable having regard to a state's resources, giving them constitutional enactment would attempt to make justiciable rights which might be unattainable, even if legally recognized. However, the Commission does think that such rights could be given constitutional recognition in a way that imposes a moral and political obligation on the state to use its resources for the welfare of citizens.[159]

[159] Government of The Bahamas, *Report of the Constitutional Commission into a Review of the Bahamas Constitution* (2013) para 3.16.

In St. Vincent and the Grenadines, the Constitution Bill of 2009 contained a chapter relating to its 'guiding principles' which addressed the right to work, to wealth, to cultural protection and access to legal aid. However, the draft Constitution was rejected at referendum. In Grenada, the Constitution Reform Advisory Committee made several recommendations for reform of the Constitution, which included broader rights and freedoms of the individual, and the associated duties of the state, to be provided for as set out in a new Chapter 1A. These rights contained in this new section included the right of citizens to a healthy, wholesome environment; and subject to the resources in, and available to the state, that citizens have a right to adequate nourishing food, potable water and good primary and secondary health facilities. However, similar to what occurred in St. Vincent and the Grenadines, the electorate rejected these expanded ideas of fundamental rights.

The failure to legislate for ESC rights, or to incorporate them into Commonwealth Caribbean constitutions begs the question of whether judges are able to influence the adoption of ESC rights. According to Justice Nelson, "judges in small societies are likely to exercise restraint where they are not assisted by the existence of ordinary legislation or the common law in recognizing those rights."[160] Furthermore, judges may feel reluctant to enter the policy arena as "they lack the expertise to tackle certain economic and social questions."[161] In addition, where the courts order a state to give effect to an ESC right, there exists the issue of having to monitor the actions of the state pursuant to the judgment being delivered.[162] However, Justice Nelson contends that in accordance with the decision of *Collymore v AG*[163], the Supreme Court was the guardian of the Constitution

[160] Justice Rolston Nelson, 'Comments on Distinguished Jurist Lecture', in Judicial Education Institute of Trinidad and Tobago (ed.) *The Rule of Law v Rulings by Laws: Promoting Development in Caribbean Societies: Seventh Distinguished Jurist Lecture 2017* (Port-of-Spain: JEITT, 2018), 68-74, (p. 74).
[161] Ibid.
[162] Ibid.
[163] Collymore v AG (1967) 12 WIR 5.

and therefore had the authority to review legislation which was inconsistent with the Constitution. As such, he states that "Caribbean judges in construing ordinary legislation are also empowered to interpret laws so as to deliver justice by recognizing in appropriate cases socio-economic rights of the weak and disenfranchised."[164] He refers to the judgment of the CCJ in the *Maya Leaders Alliance* case to illustrate his point:

> Recently, in The Maya Leaders Alliance and others v Attorney General of Belize [2015] CCJ 15 (AJ), the parties recognized that Maya customary land tenure in the Toledo District existed and amounted to property rights under the Constitution. In effect, the Court ordered the Belize Government to set up a Commission to integrate Maya customary land tenure with the general system of land tenure. The Court also directed the State to set aside a fund of BZ$300,000 as a first step towards the establishment and operation of a Land Commission to integrate the Maya system of land tenure with the received British system of land tenure. In effect, what the CCJ did was to recognize that the Maya were left out of the Constitutional conversation and to invite Belizeans to have a fresh conversation about the rights of the Maya people….. Caribbean judges in construing ordinary legislation are also empowered to interpret laws so as to deliver justice by recognizing in appropriate cases socio-economic rights of the weak and disenfranchised. [165]

Justice Nelson contends that "Caribbean courts can be innovative, but the other branches of Government have exhibited great reluctance in recognizing ESC rights."[166] He argues that socio-economic rights are "part and parcel of fundamental rights"[167] and that fundamental rights "when fully realized will lead to development of the human

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[164] Justice Rolston Nelson, 'Comments on Distinguished Jurist Lecture', in Judicial Education Institute of Trinidad and Tobago (ed.) *The Rule of Law v Rulings by Laws: Promoting Development in Caribbean Societies: Seventh Distinguished Jurist Lecture 2017* (Port-of-Spain: JEITT, 2018), 68-74, (p. 73).
[165] Ibid.
[166] Ibid.
[167] Ibid., 74.

person."[168] However, in acknowledging that the legislative and executive arms of most Commonwealth Caribbean states have been reluctant to treat ESC rights as legal rights, he suggests that this reluctance "may incline judges to adopt a policy of judicial restraint." [169] He also asserts that Commonwealth Caribbean judiciaries "construe fundamental rights too narrowly and that a more expansive view of fundamental rights"[170] should be established. He further argues that "the Executive and the Legislature in the Caribbean region have been aware of economic, social, and cultural rights for some time but have not warmly embraced them." [171] Justice Nelson instead calls for broader interpretation of the constitution to include ESC rights, stating for example that the "argument can readily be made that the right to education, the right to proper healthcare, adequate housing, and the right to work underpin the fundamental right in section 4(a) of [the Trinidad & Tobago] Constitution to 'life, liberty, security of the person and enjoyment of property…'[172] Likewise, Antoine contends that it is inaccurate to suggest that Commonwealth Caribbean constitutions do not envisage ESC rights, but instead assumptions are to be made about these rights. Accordingly, she states:

> In my view, the direction to interpret Constitutions purposively in our struggle to find the true meaning of our new Constitutions means more than merely stretching the literal meaning of the word. I believe that it speaks to finding the fundamental values, norms and aspirations of the Constitution, its *raison d'etre* – those grounding principles that our founding parents were thinking of that would give law substance and would finally confirm the capacity of a free people to determine their own destiny in a way consonant with justice.[173]

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[168] Ibid.
[169] Ibid.
[170] Ibid., 69.
[171] Ibid., 70.
[172] Ibid., 69.
[173] Rose-Marie Belle Antoine, 'The Rule of Law v Ruling by Laws: Promoting Development in Caribbean Societies', in Judicial Education Institute of Trinidad and Tobago (ed.) *The Rule of Law v*

However, such an approach to constitutional interpretation which would recognize ESC rights appears to be restricted, and Commonwealth Caribbean states continue to display arguably incognizant attitudes towards these rights.

A lack of emphasis on the implementation of ESC rights has also been noted by the United Nations Committee on Economic, Social and Cultural Rights (CESCR) in its concluding observations on periodic reports submitted by Guyana, Jamaica and Trinidad & Tobago in accordance with their obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR). Commenting on Guyana, the CESCR lamented "the scarcity of official data regarding the implementation of economic, social and cultural rights, as well as the outdated and non-disaggregated nature of much of the data provided by Guyana."[174] The CESCR noted discrepancies between official state statistics and those provided by the United Nations and expressed its concerns on "the absence of an effective data collection system, which hampers the robust analysis of the actual realization and progress of economic, social and cultural rights and the development of effective policies."[175] The CESCR also noted a lack of free legal aid services which "may prevent disadvantaged and marginalized individuals and groups, particularly Amerindian people, from claiming their rights and obtaining appropriate remedies in case their economic, social and cultural rights are at risk and /or violated."[176] The Committee further suggested that Guyana take steps to combat corruption[177]; eliminate the causes of ethnic discrimination[178]; ensure that persons with disabilities have access to the required facilities which would allow them to enjoy their economic, social

Rulings by Laws: Promoting Development in Caribbean Societies: Seventh Distinguished Jurist Lecture 2017 (Port-of-Spain: JEITT, 2018), 1-36, (p. 21).

[174] Concluding Observations of the Committee on Economic, Social and Cultural Rights: Guyana, UN doc. E/C.12/GUY/CO/2-4, para. 6.

[175] Ibid.

[176] Ibid., para. 10.

[177] Ibid., paras. 18-19.

[178] Ibid., paras. 20-21.

and cultural rights[179]; provide protection for LGBTI persons against discrimination[180] and combat gender stereotypes.[181] It also noted with concern decreasing enrolment rates and high dropout rates in primary school education[182] and limited access to healthcare services, including sexual and reproductive healthcare.[183]

Reporting on Jamaica, the CESCR urged that country to take effective measures to protect traditional knowledge and cultural expression[184]; ensure access to adequate and affordable housing with security of tenure[185]; intensify efforts to ensure access to safe potable water[186]; combat high levels of violence against women and girls[187]; legally prohibit gender discrimination and sexual harassment in the workplace[188] and protect persons who are faced with violence and discrimination because of their sexual orientation.[189] Commenting on Trinidad & Tobago, the CESCR expressed its deep concern that country had not "incorporated or reflected the Covenant or its provisions in the domestic legal order and that the State party could not provide information on case law in which rights contained in the Covenant were invoked before the courts."[190] The Committee also voiced similar sentiments to their views on Guyana and Jamaica in several areas. It urged Trinidad and Tobago to adopt measures to ensure better living conditions for persons with disabilities[191] and to eliminate all forms of violence and discrimination against women[192], while expressing its concern for the lack of social

[179] Ibid., paras. 22-23.
[180] Ibid., paras. 24-25.
[181] Ibid., paras. 26-27.
[182] Ibid., paras. 52-53.
[183] Ibid, paras. 50-51.
[184] Concluding Observations of the Committee on Economic, Social and Cultural Rights: Jamaica, UN doc. E/C.12/JAM/CO/3-4, para. 33.
[185] Ibid., para. 25.
[186] Ibid., para. 24.
[187] Ibid., para. 19.
[188] Ibid., para. 16.
[189] Ibid., para. 8.
[190] Concluding Observations of the Committee on Economic, Social and Cultural Rights: Trinidad & Tobago, UN doc. E/C.12/1/Add.80, para. 9.
[191] Ibid., para. 38.
[192] Ibid., para. 45.

housing programmes [193] as well as the lack of comprehensive anti-discrimination legislation.[194]

From the observations of the CESCR, it is suggested that poor data collection mechanisms historically has made it extremely difficult to monitor social, economic and cultural conditions, and this has hindered the development of policy and legislation to address ESC rights since independence. That the CESCR had to remind Trinidad & Tobago that once a State Party has ratified an international instrument, "the State party is under an obligation to comply with it and to give it full effect in the domestic legal order"[195] hints at that country being relaxed in its approach to respecting its international commitments of securing ESC rights to its citizens. By extension, it also appears as though the Commonwealth region as a whole has also displayed a relaxed attitude in its treatment of ESC rights. As discussed, both legislative and judicial will in incorporating ESC rights into statute and judicial decision making is necessary if the rule of law is to be shaped in such a way so as to secure the ESC rights of citizens. At present, there however appears to be a slow evolution of the rule of law in recognizing the need to address economic, social and cultural conditions under the banner of ESC rights. What the concluding observations of the CESCR indicate is that in the post-independence period, Guyana, Jamaica and Trinidad & Tobago collectively share similar problems with regard to enabling their rule of law to be sufficiently equipped to provide protection to those members of society who are vulnerable based on their economic, social or cultural standing. As such, there is also slow progress with regard to these states undertaking measures such as ensuring that the relevant data is properly collected and aggregated, as well as making constitutional and legislative commitments to specifically protect ESC rights.

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[193] Ibid., para. 28.
[194] Ibid., para. 14.
[195] Ibid., para. 9.

7. Legal Systems, Legal Traditions and Natural Law

A theme which this thesis seeks to examine is whether the Commonwealth Caribbean legal system adequately reflects the legal traditions of the region. Merryman defines a legal system as "an operating set of legal institutions, procedures and rules." However, he explains that a legal tradition is a more culturally sensitive notion than a legal system. He elaborates by considering a legal tradition to be:

> a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system in cultural perspective.[196]

Generally, the colonial foundation of the Commonwealth Caribbean legal system has meant that its basis is largely in alignment with an ideology of a law centred around monistic, statist and positivist principles. The monist nature of the transplanted legal system was indicated by the various island-states generally having a singular uniform legal system, whilst statist in the sense that control of the law was held by the state. Its positivist nature extends insofar as only what was created or recognised by the state as law, was in fact considered as law. The core of such an arrangement does little to accommodate a plurality-conscious approach. Instead, what the colonies inherited was a rule of law and a constitutional framework largely representing Diceyan constitutional theory, which is generally taken to "embrace a legal method that is analytical, formalist, scientific, mechanical, descriptive and positivist."[197] Arguably, Dicey's ideologies and its influence on the rule of law were based around notions of imperialism and the expansion

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[196] John Henry Merryman and Rogerlio Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford: Stanford University Press, 2007), 2.
[197] Mark Walters, 'Dicey on Writing the Law of the Constitution', *Oxford Journal of Legal Studies*, 32 (2012), 21-49, (p. 22).

of empire. Originating from Dicey's ideology is an authoritative perception of public law of which emphasis is placed on the law's authoritarian qualities, with a disproportionate weight of importance given to Parliamentary sovereignty and the functions of arms of the state.[198] As Glenn explains however, "the growth of the formal law of the state necessarily implies a decline in other forms of social cohesion, or glue."[199] As a result, "the small, local ways of life - of community, work and play - become subject to legal control and inevitably wither."[200]

By subscribing to a Westernised perspective of natural law incorporated into an inherited Anglo-centred rule of law, limited regard has been given to diversity when conceptualising how the traditional cultural norms are to be integrated into modern day regional legal systems. Perhaps this can describe why Commonwealth Caribbean societies are socially conservative, especially with regard to giving proper attention to how the law in other jurisdictions have adapted to accommodate various segments of society. By and large, West Indian communities continue to consider homosexuality, contraception and polygamy immoral, and certain traditional religious practices taboo, while there has been limited discourse towards any legislative agenda to discuss issues such as abortion, prostitution and the decriminalization of marijuana for medicinal and religious purposes. This societal thought appears influenced by its own ability to accept that the law is harsh, but it is indeed the law, as akin to the belief of legal positivists as entrenched in the maxim *dura lex sed lex*.

Controversial issues such as the aforementioned may lay claim to being human rights issues, and this opens the debate as to whether natural law and human rights are one and the same. 'Natural law' has been described as something which "provides a name

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[198] Ibid.
[199] Harold Patrick Glenn, *Legal Traditions of the World* (Oxford: Oxford University Press, 2004), 137.
[200] Ibid.

for the point of intersection between laws and morals."[201] Cotterrell expands this description stating that "law cannot be properly understood except in moral terms" and notes that the history of natural law extends through at least 2,500 years of Western philosophy.[202] The origins of natural law theory have essentially been entrenched in the assumption that there is a force greater than "man", by which all human actions will be measured. It has been considered as a tradition which has claimed universality for its principles and as something which has been a significant precursor to the emergence of the nation-state.[203] By the 18th century however, natural law had become visibly Christianised, with its proponents advocating its global validity. Kelly has cited Sir William Blackstone for instance, who in 1765 wrote that natural law:

> being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all such times: no human laws are of validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately from this original.[204]

Tierney further explains that natural justice is often associated with human rights:

> I use the terms natural law and human rights interchangeably. The term 'human rights' is often used nowadays to indicate a lack of necessary commitment to the philosophical and theological systems formerly associated with the older term, 'natural rights.' But the two concepts are essentially the same. Human rights or natural rights are the rights that people have, not by virtue of any particular role or status in society, but by virtue of their very humanity.[205]

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[201] Alexander Passerin D'Entrèves, *Natural Law* (London: Hutchinson, 1970), 116.
[202] Roger Cotterrell, The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy (London: Butterworths, 1989), 115.
[203] William Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000), 61.
[204] John Kelly, *A Short History of Western Legal Theory* (Oxford: Clarendon Press, 1992), 259.
[205] Brian Tierney, The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625 (Michigan: Eerdmans, 1997), 2.

In theory the Westminster modelled constitutions appear to place emphasis on human rights protection, with each containing a chapter on fundamental rights and freedoms. Where ordinary legislation gives the state any ability to violate any specified rights and freedoms within the constitution, the ordinary legislation would not be able to take any effect. The main fundamental rights and freedoms are within the spirit of the European Convention on Human Rights (ECHR)[206] and include the right to life; freedom from cruel and inhuman treatment; freedom of expression; freedom of thought, conscience and religion; freedom of association; freedom of movement; the right to a fair trial; freedom from arbitrary arrest; freedom from discrimination on specified grounds and the protection of the law. Although the fundamental rights and freedoms reflected within the Westminster modelled constitutions such as the right to life, to liberty, to freedom of speech, to freedom of association and to not be deprived of property without due process or adequate compensation generally represent those civil and political rights considered as natural rights, there seems to be hesitance in expanding the framework of the constitution to include other rights that ideally ought to be afforded to society. Compelling to this notion are comments by the present Prime Minister of St. Vincent and the Grenadines, Dr. Ralph Gonsalves, specifically addressing the constitutional right to freedom of expression stated, "Too often Caribbean legislators go beyond the outer limits of a person's right to freedom of expression and they are insufficiently reproached by Caribbean judges."[207] Neither do the constitutions incorporate any social and economic rights, for example as found in the 1976 International Covenant on Economic Social and Cultural Rights (ICESCR) such as the right to education, work and health. Other important rights have also been put forward as worth being constitutionally recognised

[206] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), ETS 5, 4 November 1950.
[207] Ralph E. Gonsalvez, *The Politics of Our Caribbean Civilisation: Essays and Speeches* (Kingstown: Great Works Depoty Ltd, 2001), 222.

such as the right to privacy, protection of the environment as well as expanding the definition of discrimination to include disability and sexual orientation.

According to Fiadjoe, one of the dilemmas facing courts generally is whether to uphold "formalism" over "justice", particularly in light of regional judges having been trained in the common law, which by its innate character has an inclination to formalize.[208] Fiadjoe argues that Commonwealth Caribbean courts have tended to be excessively formalistic and unduly restrictive in their interpretative constitutional functions.[209] However he suggests that following the decision in *Fisher*[210], Caribbean courts have displayed a slightly liberal shift towards the direction of judicial activism especially in human rights matters, while rejecting formalism. In that JCPC case, Lord Wilberforce advised that the proper way to construe a constitution based on the Westminster model is to treat it not as if it were an Act of Parliament but rather as *sui generis*, calling for principles of interpretation of its own, suitable to its character and without necessary acceptance of all the presumptions that are relevant to legislation of private law.

Like Fiadjoe, Justice Adrian Saunders has also commented that the domain of human rights provides an indication of the way in which the courts have adapted their approach to fundamental rights and freedoms contained in the constitutions of the Commonwealth Caribbean states in response to new social and political realities.[211] Justice Saunders suggests that during the immediate post-independence period, particularly in the 1960's and 1970's, the general approach of the state to fundamental rights and freedoms was conservative, with citizens' rights being construed restrictively

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[208] Albert Fiadjoe, 'Judicial Attitudes to Commonwealth Caribbean Constitutions', *Anglo-American Law Review*, 20 (1991), 116-130.
[209] Ibid.
[210] *Fisher* (see n. 122, p. 45).
[211] Justice Adrian Saunders, 'Capital Punishment Jurisprudence in the Caribbean', Lecture Delivered to the Guyana Judiciary (23 June 2012), 8.

in comparison to modern day standards. However, Justice Saunders describes the post Cold War globalization of 'human rights' and international jurisprudence brought about by the decisions of judges in other jurisdictions as now playing a decisive role in influencing the interpretation of constitutional rights in the Commonwealth Caribbean.[212] He argues that capital punishment cases decided by the JCPC such as *Pratt*[213] and *Lewis v The Attorney General*[214] which decided inter alia that it was unlawful to execute a prisoner while his petition was pending in the Inter-American Human Rights process, relies heavily on international jurisprudence. It is therefore suggested that Commonwealth Caribbean constitutions have not wholeheartedly embraced natural law principles, especially in a human rights context. Undoubtedly, the colonial transplanted legal system evolved to the point of leaving the colonies with a remnant of British socio-political and legal ideologies in the form of Westminster based constitutions in the aftermath of their independence.

Antoine suggests that while the former colonies of Britain in the current day English-speaking Caribbean have attempted to an extent to shape new identities in the post-independence period, the way that these states express themselves remain largely neo-colonial in a British context.[215] This sentiment was expounded by Justice Sharma in the Trinidad and Tobago Court of Appeal judgment in *Boodram v AG and Another*.[216] In his judgment, the learned judge stated:

> even after our independence, our courts have continued to develop our law very much in accordance with English jurisprudence. The inherent danger and pitfall in this approach is that, since independence our society has developed differently from the

[212] Ibid, 9.
[213] *Pratt* (see n. 138, p. 49).
[214] Neville Lewis and others v The Attorney General of Jamaica and Another [2000] UKPC 35, (2001) 2 AC 50, (2000) 57 WIR 275.
[215] Antoine, *Law and Legal Systems* (see n. 11), 3.
[216] *Boodram v AG and Another* (1994) 47 WIR 459.

> English and now requires a robust examination in order to render our Constitution and common law more meaningful.[217]

Antoine calls for a re-interpretation of the existing legal framework, by deconstructing the law to the extent that it becomes transformed from what she views as its role of subjugation into an identity of liberation. The outcome of this process would be the building of a more just and equitable society, with the judiciary and legislature assuming the roles of social engineers and seeking to "decolonise society." This would be achieved not merely by attempting to tailor inadequate laws into a social context, but by exercising a conscious impetus to establish new law and if reasonable, new legal systems to uphold a more equitable social, economic and political system.[218] This approach has however at times not been met by judicial agreement, and judicial opinion within the region has been expressed to the extent that where there may be a lacuna in the law, or where the law may be contrary to modern day morality, those issues are not within the direct concern of the judge, whose function is not that of a social engineer imposing his own values by inventive judicial interpretation.[219] Yet any process of decolonization remains incomplete and somewhat stagnated. According to Girvan, "every single ethno-cultural group that occupied the Caribbean space did so on terms that acknowledged the superiority of the culture of the colonising power; and destroyed or devalued their native culture."[220]

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[217] Ibid, 470.
[218] Antoine, *Law and Legal Systems* (see n. 11, p. 23), 27.
[219] *In the Estate of B*, [1999] CILR 460 (Grand Court, Cayman Islands).
[220] Norman Girvan, 'Colonialism and Neo-colonialism in the Caribbean: An Overview', Paper Prepared For IV International Seminar Africa, The Caribbean And Latin America, St. Vincent And The Grenadines (24 - 26 November 2012), 10.

Conclusion

In terms of protecting democracy, the Westminster modelled Constitutions of the Commonwealth Caribbean continue to secure the recognition of government which is based on universal adult suffrage, and characterised by fair elections which are regularly held. However, "the durability of almost every aspect of the Westminster model would come to be tested to its limits in the post-independence era."[221] The ongoing critique of the constitutions provided to the former colonies by its Whitehall drafters is that these constitutions were in no way indigenous to the needs of a diverse collection of people who had been relocated to the region from other parts of the world, and in the majority of cases by force. It is along these lines that the question arises as to whether these constitutions were a true reflection of a localized social contract and a sufficient recognition of a "collective self" indicative of the region's diverse character. The success of the constitutional review process may be limited to the extent of the seriousness of approach by regional governments, who ideally ought to treat the process as an important project of a national interest, with an adequate budget, and strategy which would encourage inclusive and comprehensive consultations, defined timelines and specific outputs. As will further be discussed in this thesis, situations continue to arise where there are conflicts between formal law indicative of the institutions which were formed during, and arising from the colonial experience of the region, and 'soft' law demonstrated through informal practices by those segments of society who maintain an affinity with legal traditions outside of the scope of 'hard law.' These aforementioned scenarios are important in the context of the objective of the thesis, as are important indicators in demonstrating whether the rule of law reflects a position of post-colonial certainty.

[221] O'Brien, *The Constitutional Systems of the Commonwealth Caribbean* (see n. 36, p. 28), 35

CHAPTER II

LAW AND THE COMMONWEALTH CARIBBEAN FAMILY

Introduction

The consideration of how family law operates in the Commonwealth Caribbean is an important aspect of this thesis. This area is important in qualifying the objective of the thesis to explore whether the rule of law reflects adequate post-colonial 'certainty.' Generally speaking, as a result of legal transplant, the substantive principles of family law in the Commonwealth Caribbean have been historically akin to those of England, despite the existence of family structures which largely do not form part of British society. Arising from this arrangement, according to McDowell, the Commonwealth Caribbean jurisdictions still face shortcomings in its family law mechanisms, with the criticisms directed to the law relating to children in England prior to the United Kingdom Children Act of 1989[1] being equally applicable to the West Indies.[2] Of these criticisms was the development of *ad hoc* family law jurisprudence as stated by Bromley and Lowe, which McDowell identifies as tantamount to the West Indian position.[3] According to Bromley and Lowe:

> Before the Children Act 1989, child law, like so much of English law, had developed upon an ad hoc basis through both statute and case law and predominantly in terms of remedies rather than rights. In the result the law had become complicated and technical and had no underlying general philosophy. Remedies and procedure varied according to the jurisdiction invoked and the court involved. There were, for example, separate statutes conferring different powers on the courts to make orders relating to

[1] Children Act 1989 (UK).
[2] Zanifa McDowell, *Elements of Child Law in the Commonwealth Caribbean* (Kingston, Jamaica: University of the West Indies Press, 2000), 4.
[3] Ibid.

> children in divorce proceedings, in proceedings for financial relief before magistrates and in so-called free standing proceedings, namely those solely concerned with disputes about children.[4]

This arrangement often fell short of adapting to local conditions, and was quite evident in several judicial pronouncements in the sphere of family law jurisprudence which will subsequently be discussed. It is from this background that this chapter will look at the importance of the family to society, and then proceed to defining *family law* in the Commonwealth Caribbean. It will consider how the regional family law jurisprudence is being shaped in its emergence from old British legislation which made its way into Commonwealth Caribbean legal systems. It will also look at the progressive efforts to establish family courts and juvenile courts in various Commonwealth Caribbean territories. The impetus placed on reform in the face of commitments to international and regional agreements will also be considered. The chapter will end with the conclusion the rule of law will only benefit where there is even compromise between institutionalized hard law and social informal traditions, such as those which are evident in customary family practices.

1. Importance of the Family in Society

The concept of the family is an important element of the way by which society is configured. For Grotius, affinity with the family unit results in the creation of a type of social human nature that engenders the rationale of civil and political institutions.[5] His portrayal of the family is one founded by marriage, where husbands and wives educated their children in ways which would be becoming of civil conduct.[6] For Althusius, the

[4] Patrick Bromley and Nigel Lowe, *Bromley's Family Law* (London: Butterworths, 1992), 250.
[5] Hugo Grotius, *On the Rights of War and Peace*, trans. by William Whewell (Cambridge: Cambridge University Press 1853), 6–7.
[6] Ibid.

family "is rightly called the most intense society, friendship, relationship, and union, the seedbed of every other symbiotic association."[7] By way of Althusius's analysis of symbiotic association, there is the suggestion of quite a seminal role for the family, which Walters further describes:

> Human life and lives are formed within a series of overlapping symbiotic associations. The respective rights of these associations are determined by their inherent natures and structures. The family is a simple and private association based upon the natural institution of marriage, and is the primary association from which all others constituting civil society are derived, because of the mutual affection and assistance it affords……Families consist of conjugal and kinship associations, the former encompassing a covenant between wife and husband, the latter entailing the education of children. What is perhaps Althusius's most perceptive contribution to social and political thought is his insistence that the family is a political rather than economic institution, for no other private or public association can be ordered properly in its absence. Consequently, household governance is foundational to just social and political ordering: well-ordered families are a prerequisite for preserving a right social and political order, because all symbiotic association is essentially, authentically, and generically political. But not every symbiotic association is public. Rather, private associations, such as families, are the seedbeds of public association and as such are political in nature.[8]

Essentially both Grotius and Althusius establish a direct link between the family and the social and political order, with the existence of this link serving as evidence of a relationship enabled by the law of nature and by a natural right of association.[9] Alternatively, the argument exists that civil rights are not grounded in natural rights, but instead exist because of the consent of parties to a social contract.[10] The effect of this is

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[7] Johannes Althusius, *The Politics*, trans. by Frederick S. Carney (London: Eyre & Spottiswoode, 1964), 23.
[8] Brent Walters, *The Family in Christian Social and Political Thought* (Oxford: Oxford University Press, 2007), 65.
[9] Ibid, 66.
[10] Ibid.

to discredit the notion of an organic society created by the polarity of human associations when the public and private domains are juxtaposed. Instead, the distinction is that in the private sphere, such as in the realm of the family, inalienable rights exist and operate only by those persons possessing them within that realm, whereas in the public sphere, inalienable rights can either be assigned or surrendered by instance of the general will of the public. Accordingly, contractarians such as Hobbes describe the family as a "little monarchy"[11] while Locke, although appealing to a divine ordinance which instructed parents to care for their children, concluded that no conclusions of larger political implications could be drawn from this relationship.[12]

Yet, even where the inalienable rights of the private domain are separated from the inalienable rights of the public domain, there is arguably still association between both domains when it is considered that each person within the private sphere possesses the birth right which enables a claim to affinity and association with the public realm, either apart or congruous with the private domain of the family, with the family being the medium by which that person biologically comes into existence. As such, a relationship between the nation and the family is suggested by Kant to be connected, in that familial affinity and national affinity are equivalent, with the possibility of national affinity being greater, since both are established at the time of birth. Accordingly, Kant states:

> The human beings who make up a nation can, as natives of the country be represented as analogous to descendants from a common ancestry *(congeniti)* even if this is not in fact the case. But in an intellectual sense or for the purpose of right, they can be thought of as offspring of a common mother (the republic), constituting, as it were, a single family *(gens natio)* whose members (the citizens) are all equal by birth.[13]

[11] Thomas Hobbes, *Leviathan* (Oxford: Oxford University Press, 1996), ch 20.
[12] John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1967), ch 6.
[13] Immanuel Kant, *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1996), s 53.

In a sense, Kant's discourse suggests that there is something resembling a bond of obligation between the individuals comprising the family within the private sphere, and the larger social contract with the nation of the public sphere. Such a relationship makes it imperative that the rule of law is able to allow for congruity across both the private and public realm so as to facilitate the portability and recognition of those rights established in the private realm into the public realm, if it means that the recognition of those private rights actually encourage the fostering of the Republic. In the Commonwealth Caribbean, the historical conflict has been between private norms brought about by traditional beliefs and practices and public norms largely dictated by the formal law. This conflict is no different when it comes to considering the interplay between the legal system and the family. It would follow that the way in which the family is defined within the Commonwealth Caribbean and by its legal systems needs to be considered.

2. Defining *'Family Law'* in the Commonwealth Caribbean

The concept of the 'family' in the Commonwealth Caribbean does not bear a straightforward definition in alignment with the common notion of the nuclear family consisting a father, mother and children. Family law received from English common law into the Commonwealth Caribbean countries has been broadly accepted to be law which views the family unit from the perspective of being a nuclear family defined by marriage and shared residence. This of course does not recognise the West Indian reality. Keith Patchett for instance has argued that the English legal system which was transplanted to its colonies makes no concessions to the Afro-Caribbean family structure and that this system insists upon principles out of touch with social facts and customarily ignored.[14]

[14] Keith Patchett, 'Some Aspects of marriage and divorce in the West Indies', *International & Comparative Law Quarterly*, 8 (1959), 632–677.

The generally accepted starting point for the definition of Afro-Caribbean family structures is the work of British Welfare Adviser Thomas Spensley Simey whose 1946 publication titled *Welfare and Planning in the West Indies*[15] considered the family composition of 270 Jamaican families. Simey's classification suggests a four-fold approach to defining West Indian family patterns, of which include (i) the Christian family defined by patriarchal domestic units based on legal Christian marriage; (ii) faithful concubinage which is a patriarchal domestic unit built on a union which is neither religiously nor legally sanctioned; (iii) the maternal or grandmother family, which would describe female headed households of women, children and grandchildren; and (iv) cohabitating unions of less than three years duration, which are also classed as 'visiting relationships.'[16] Unlike English common law, the concept of the traditional Christian marriage and legal rights originating from such a union is somewhat inconsistent with the West Indian reality in the sphere of cohabitational relationships and non-marriage unions. According to Michael Garfield Smith in *West Indian Family Structure*:

> The persistence of high illegitimacy rates, unstable unions, and anomalous forms of domestic groups in the West Indies are all due to the same conditions. These conditions had their historical origin in slavery, especially the mating organization of slaves. West Indian slaves were not allowed to marry but they were free to cohabit consensually or to mate extra-residentially as they pleased.[17]

Expanding the scholarship of Smith, Welstead and Edwards have observed that the Afro-Caribbean family in terms of its often matriarchal structure is a product of the experience of slavery as grandmothers and mothers were left to take care of children when men were forcibly removed from the family.[18] Marriage of slaves held no legal

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[15] Thomas Spensley Simey, *Welfare and Planning in the West Indies* (Oxford: The Clarendon Press, 1946).
[16] Ibid, 82-83.
[17] Michael Garfield Smith, *West Indian Family Structure* (Seattle, University of Washington Press, 1962), 260.
[18] Mary Welstead and Susan Edwards, *Family Law* (Oxford: Oxford University Press, 2013), 272.

recognition and traditional marriages were also therefore not given any credence. Welstead and Edwards argue that this reality gave rise to a legacy whereby grandmothers adopt the central role of the parent in a matriarchal structure, whereas fatherhood for many Afro-Caribbean males is a role which is transitory. Similarly, Williams has also written that "the insignificance of family connection was consistently achieved through the suppression of any image of blacks as capable either of being part of the family of white men or having family of their own."[19]

In contrast to the family customs originating from slavery and post-slavery society amongst the Afro-Caribbean group are the practices of the East Indian immigrants who settled across the British West Indies during, and after the British indentured labour schemes. Following the Afro-Caribbean group, the Indo-Caribbean genus is the second largest cultural group in the Commonwealth Caribbean, with East Indians comprising over 40 percent of the populations of Guyana and Trinidad and Tobago.[20] The Indo-Caribbean family structure is often regarded as one of an extended family domiciled together through the male lineage and under the authority of the eldest male, thereby being patriarchal and male dominant. This tradition is comprehensively explained by Barry Chevannes, who writes:

> The marriage ceremony, presided over by the Pandit (Hindu Priest), takes place at the home of the bride. Thereafter, the couple goes to live in the home of the groom's father, where they and their children come under his authority. In time, a couple will go off to live by themselves, but will retain some form of recognition of the principle of jointness, for example by working together with the rest of the extended family in the rice paddy, as commonly happens in Guyana, or returning to the family home on occasion to worship together....[When the eldest male dies] his authority passes to his eldest son, on whom falls the obligation of observing certain mortuary rites. Should a

[19] Patricia Williams, *The Alchemy of Race and Rights* (Massachusetts: Harvard University Press, 1991), 162.
[20] Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (New York: Routledge-Cavendish, 2008), 7.

> family be so unfortunate as not to have a son, a male relative is called upon to carry out this duty.[21]

In defining and understanding the family structures of the Commonwealth Caribbean, it is suggested that the real value for the legal system is to take the approach of considering what a family *does*, as opposed to what a family *is*. By this function-based approach, the law would look at defining what ought to be the functions of a family, for instance roles such as providing care and security for its members, providing financially and raising and socialising children.[22] For example the traditional practice of the family being responsible for providing the security of land is one which is prevalent across the Commonwealth Caribbean.

Family Land

The term 'family land' describes land which is accepted by the family as being the property of successive generations of the family. The tradition of establishing family land in the Commonwealth Caribbean has been attributed to being developed following the emancipation of slaves and as a continuation of customary land tenure based on West African practices, which was the region where most of the former slaves would find their ancestral heritage.[23] This arrangement has also been attributed to extended families combining their resources to be able to afford land following slavery, with the result being that the land acquired was regarded as belonging to the family and future generations.[24] This practice was a common response to the restrictive land acquisition policies adopted by the colonial island governments following emancipation, with the intention being to tie the former slaves to the plantations in order to have ready access to a labour supply

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[21] Barry Chevannes, *Betwixt and Between: Explorations in an African-Caribbean Mindscape* (Kingston, Jamaica: Ian Randle Publishers, 2006), 182.
[22] Jonathan Herring, *Family Law* (London: Pearson, 2007), 3.
[23] Jane Matthews Glenn, 'Mixed Jurisdictions in the Commonwealth Caribbean: Mixing, Unmixing, Remixing', *Electronic Journal of Comparative Law*, 12.1 (2008), 1-23 (p. 21).
[24] Ibid.

for the plantation. By the custom of family land, the land is not solely owned by the present family members in a formal legal sense. In applying formal law, the land is instead held in indivision by its present occupiers, so that a legal co-ownership or by common law, a tenancy in common is created. Formal law would therefore bestow unto the owners an extensive range of property rights such as the right to convey title to the property by sale, as well as rights to individual family members to be able to sell one's share in the land to another family member or someone outside of the family as well as to pronounce a heir to one's share by will. The spirit of the customary system of family land however frowns upon family members deciding to resort to formal law, as this would act against the purpose of family land as regarded by tradition and custom.

The notion of family land appears to be a customary practice which indicates the formidability of informal law based on historical and traditional experiences in a family law context. Its existence may be as a result of a collective belief to keep the land amongst the members of the family. Evidence of this strength was observed in St. Lucia by Jane Matthews Glenn who has written:

> The inalienability of family land became a concern in the neo-liberal 1980's, and a 1984 reform package provided that one or more family members could be registered on title as trustees having the authority to sell or mortgage the property on behalf of all family members. However, little use has been made of this possibility, illustrating the strength of the informal law.[25]

The importance of keeping the land amongst the family is exemplified by the practice in St. Lucia where whilst some family members reside on the family land, those who have left the land have the right to return to the land if they wish to do so. This is readily accepted by those family members residing on the land, especially where the

[25] Ibid.

returning family member is in a situation of financial need, thereby giving meaning to the land as being able to provide an economic and social safety net.[26]

The way in which the Commonwealth Caribbean family is defined, or at least understood by the legal system is therefore an important fundamental for allowing the law to evolve into rules which are dynamic enough to recognise and be adaptable in understanding different family practices. The next section will consider how the jurisprudence in the Commonwealth Caribbean has developed in terms of the aforesaid.

3. Early conflicts and evolution of the jurisprudence

Generally, the three most important features of law in a legal system according to legal scholar Joseph Raz is that it ought to be normative, institutionalized and coercive. According to Raz, "It is normative in that it serves, and is meant to serve, as a guide for human behaviour. It is institutionalized in that its application and modification are to a large extent performed or regulated by institutions. And it is coercive in that obedience to it, and its application, is internally guaranteed, ultimately, by the use of force."[27] To place the notion of 'family law' into a court system, the imperative should also be that this system is able to display the features of being normative, institutionalized and coercive. The challenge however is crafting a Commonwealth Caribbean normative which can neglect irrelevant external influences brought about from the region's early historical legal development as well as building those institutions which are responsible for adjudication with the capacity to be adaptable in its understanding of what the family is in a Commonwealth Caribbean context. The approaches to confronting these challenges

[26] Ibid.
[27] Joseph Raz, The Concept of a Legal System. An Introduction to the Theory of Legal Systems (Oxford: Clarendon Press, 1997), 3.

will now be considered in terms of the evolution of family law jurisprudence in the region and the institutional development of specialized family and juvenile courts.

(i) Matrimonial Rules

Special legislation to protect religious forms of marriage amongst the Indo-Caribbean population had historically been met with problems as a result of conflict with English principles. One particular area which led to calamitous results was the inflexible application of English matrimonial rules, was seen in *Henry v Henry*[28], a decision originating from the Trinidad and Tobago Court of Appeal. In this case, the Court of Appeal considered an appeal of a husband who was ordered by the Magistrate's Court by virtue of the *Separation and Maintenance Ordinance*[29] to pay maintenance for wilful neglect of his wife. The couple had been lawfully married in accordance with the provisions of the *Muslim Marriage and Divorce Registration Ordinance*[30]. At the appeal hearing, counsel for the husband submitted that Islamic law did not form part of the colony and was highly repugnant to local matrimony law because it may give rise to polygamy, while the court also received evidence from an expert witness in Islamic law and custom who indicated that Muslim marriages may be polygamous.[31] Bearing this in mind, the Court of Appeal held that the magistrate had no jurisdiction to make the order for maintenance as the wife was not entitled to any remedy[32]. The court therefore indicated that only a marriage that is monogamous in the Christian sense of the term may entitle the parties to relief provided by the matrimonial laws of England, by which the Trinidad and Tobago laws relating to marriage are based. The court commented that was a well-established principle of law that the only kind of marriage that entitled the parties

[28] *Henry v Henry* (1959) 1 WIR 149 .
[29] Separation and Maintenance Ordinance 1950, Cap 5, No 15 (1950).
[30] *Muslim Marriage and Divorce Registration Ordinance 1936*, Cap 29, No 4 (Trinidad and Tobago).
[31] *Henry* (see n. 28, p. 80), 150.
[32] Ibid, 153.

thereto to the remedies, adjudication or relief of the matrimonial law of England is a marriage that is monogamous in the Christian sense of the term.[33] Referring to the decision in *Hyde v Hyde*[34], the court pronounced that marriage as understood in Christianity was the voluntary life-long union of one man and one woman, to the exclusion of all others.[35]

In *Mohamed v Mohamed*[36], another decision originating from Trinidad and Tobago, the court again considered an application by a wife whose marriage was registered under the *Muslim Marriage and Divorce Registration Ordinance*[37] for a maintenance order against the husband. The court did not depart from its position in *Henry* and held that the wife was not entitled to any remedy, adjudication and relief which would be afforded to monogamous relationships by Christian definition, despite being in a marriage legally recognised by the laws of Trinidad and Tobago.[38] However, the court held that she would be able to make a claim for maintenance for their children who the court considered as being legitimate[39] by virtue of the said *Muslim Marriage and Divorce Registration Ordinance.*[40]

Contrasting with the decisions arising out of judicial consideration of the *Muslim Marriage and Divorce Registration Ordinance*[41] is that of the court's position with regard to Hindu marriages. Whereas the *Muslim Marriage and Divorce Registration Ordinance*[42] provided for the registration of Muslim marriages and divorces, a significant difference was that the *Hindu Marriage Ordinance*[43] stated that a marriage solemnised

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[33] Ibid.
[34] *Hyde v Hyde* (1866) L.R 1 P & D, 133.
[35] *Henry* (see n. 28, p. 80), 152.
[36] *Mohamed v Mohamed* (1960) 3 WIR 202.
[37] *Muslim Marriage and Divorce Registration Ordinance* (see n. 30, p. 80).
[38] *Mohamed* (see n. 36, p. 81), 207.
[39] Ibid.
[40] *Muslim Marriage and Divorce Registration Ordinance* (n30).
[41] Ibid.
[42] Ibid.
[43] *Hindu Marriage Ordinance 1945*, Cap 29, No 5.

between persons of the Hindu faith would be valid as if it had been solemnised in conformity with the provisions of the *Marriage Ordinance*[44], which was the Ordinance that applied to the marriage of persons who followed the Christian faith. This notion was considered in *Maharaj v Maharaj*[45], where the issue to be considered was whether the Supreme Court had jurisdiction to grant a divorce for a marriage registered under the Hindu Marriage Ordinance, and therefore whether a Hindu marriage would be able to receive any form of judicial remedy or relief. The court held that while Muslim marriages were limited under the scope of the Muslim Marriage Ordinance, Hindu marriages were not.[46] The court commented that in England, Hindu marriages could be polygamous and therefore not judicially recognised for the purpose of relief, but in Trinidad and Tobago, Hindu marriages were monogamous.[47]

An attempt to address the inequitable position in the treatment of Muslim marriages took the form of an amendment to the *Muslim Marriage and Divorce Ordinance*[48], with a section inserted to provide that marriages effected or contracted under this Ordinance shall be as valid as if it had been solemnised or contracted in conformity with the provisions of the *Marriage Ordinance*.[49] However, no additional amendment was made to the effect of the law recognising polygamous marriage. The court in *Rafique v Rafique*[50] equated the law of the land as being akin to Christian custom and observed that "although the Moslem religion may approve and exalt to equality as wives women other than the wife of a valid monogamous marriage, the status of such women in the eyes of the law of the land would be no different from that of paramours whose existence is condemned by the Christian religion."[51]

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[44] *Marriage Ordinance 1923*, Cap 29, No 2 .
[45] *Maharaj v Maharaj* (1958) TT HC 1.
[46] Antoine, *Commonwealth Caribbean Law and Legal Systems* (see n. 20, p. 76), 51.
[47] Ibid.
[48] *Muslim Marriage and Divorce Registration Ordinance* (see n. 30, p. 80).
[49] *Marriage Ordinance* (see n. 44, p. 82).
[50] *Rafique v Rafique* Trinidad and Tobago CA 1966 CA 132, (1966-1969) 9 T&T LR 184..
[51] Ibid, 133.

Interestingly, although English matrimonial law was the dominant law across the former English colonies in the Caribbean, Guyana maintained the Roman-Dutch notion of malicious desertion arising from pre-meditated thought. In *Siebs v Siebs*[52], the Guyana Court of Appeal considered the English doctrine of constructive desertion and indicated that there was no difference in the state of mind which would give rise to the Roman-Dutch doctrine of malicious desertion when compared to constructive desertion. Accordingly, the judge commented:

> For my part, I can find no difference between the state of mind required to found malicious desertion, and that which must exist in the spouse whose conduct leads the other spouse to depart from the matrimonial home. The object is the same, the mode of achieving that object is different.[53]

The Guyana High Court also displayed a flexible approach in its judgment in *Rahieman v Hack*[54] where it considered a property dispute between a couple who had not registered their marriage although they had been married by Islamic law. The court sought to apply equitable principles to provide the female with property rights, while recognising that the union was of "some permanence and flows from a marriage in accordance with their religion" while commenting that culturally and by way of life of many Guyanese citizens, "many persons who are married according to their religion appear not to be interested in registering their marriages accordingly." The decision was subsequently upheld by the Guyana Court of Appeal.[55]

(ii) Paternity

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[52] *Siebs v Siebs* Guyana (1969) 14 WIR 72.
[53] Ibid.
[54] *Rahieman v Hack* Guyana 1975 HC 24, affd CA (1977) 27 WIR 109.
[55] Ibid, 28.

In *F v M*[56] it was held that in determining paternity, the guiding principle was that the best evidence, which is scientific evidence in the form of a DNA test, should be obtained to arrive at the truth as to paternity. In this matter, the Barbados Court of Appeal appeared guided by the principle established by the English courts which recognised that paternity ought to be properly established by science and not by legal presumption or anecdotal evidence.[57] The court also noted that importance of DNA evidence as the best scientific evidence to determine paternity had also been accepted by courts internationally, including the European Court of Human Rights.[58] Having considered the position in the United Kingdom and Europe, the court agreed that reliance was increasingly being placed on scientific evidence in proceedings in which the issue of parentage arose and that where paternity was disputed, the presumption that a person was the father based on the registration on the birth certificate would often in practice merely determine the burden of proof.[59] In such circumstance, the court therefore observed that scientific paternity testing would prevent the need to resort to presumptions.

Quite interestingly in this matter, the non-scientific evidence surrounding the conception and registration of the birth of the child had been weighted heavily in favour of the appellant being the father of the child but the DNA evidence had stated that the appellant could not be the genetic father of the child. The court agreed that DNA evidence was generally conclusive evidence of paternity but the manner of obtaining the samples and the procedures for carrying out the tests had to be such that they were beyond reproach and not subject to challenge.[60] Under existing law, the court had no authority to order that samples be provided for a DNA test, but advised parties that the issue of paternity should be resolved by a new DNA test, to be properly conducted as agreed by the representatives

[56] *F v M* (2009) 74 WIR 64.
[57] Ibid, 77.
[58] Ibid, 78.
[59] Ibid, 75.
[60] Ibid, 80.

of both parties to the trial, and as approved by the court.[61] Consequently, the court advised that with the consent of both parties, it would make an order that samples be taken and a fresh DNA test be carried out, and following the results, it would be determined whether the existing paternity and maintenance order be set aside.[62]

(iii) Presumption of Advancement and 'Illegitimate Children '

In *Re Harper (deceased); Brathwaite v Harper*[63] the High Court of Barbados considered the principle of advancement which is an equitable principle whereby in a situation where a man transfers money to his wife or child or a person to whom he stands in *loco parentis*, he is presumed to have made an advancement to the other person. In such situations there is a clash of presumptions in that the presumption of a resulting trust is rebutted by the presumption of advancement, in the event that the transferor intended to advance the item as a gift by reason of a special familial relationship. This concept resulted to the court raising the issue of how to treat with children born out of wedlock in relation to the principle of advancement. The court noted that it had been held in previous cases and stated by English textbook writers that 'child' means 'legitimate child' but the presumption of advancement would still operate in a situation where a father stood *in loco parentis* to his 'illegitimate' child.[64] The court held that in the context of Barbadian society where a majority of children are born out of wedlock, it would be incompatible with social reality to adopt a narrow interpretation of 'child' and instead a liberal, purposive interpretation was required.[65] Quite progressively, the Barbados court adopted the position that a court cannot ignore social phenomena at work within its jurisdiction.[66]

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[61] Ibid.
[62] Ibid.
[63] Re Harper (deceased); Brathwaite v Harper (2007) 72 WIR 40 .
[64] Ibid, 47.
[65] Ibid.
[66] Ibid.

Quoting the Annual Reports of the Registrar of the Barbados Supreme Court for the period 1970 to 1980, the court indicated that that 72% of children born in that period were born out of wedlock.[67] In light of these reasons, the court went on to hold that the presumption of advancement applies to all children in Barbados, whether born in or out of marriage. Sir David Simmons CJ further justified his decision by stating:

> Of course, I am fortified in this view by two examples of sociological jurisprudence enacted as legislation in the early 1980s to improve the status of women and ameliorate the status of children born out of wedlock. The Family Law Act, Cap 214 expressly recognises unions other than marriage and equates the status of such unions with marriage if certain preconditions are satisfied. So that, broadly, children of such unions are treated in the same way as children of a marriage. The enactment of the Status of Children Reform Act, Cap 220 abolished the status of illegitimacy and mandated that, after 1 January 1980, all children are of equal status.[68]

(iv) The Barbados Family Law Act and the Presumption of equal division when awarding ancillary relief

A move away from the commonplace use of English law was indicated in *Proverbs v Proverbs*,[69] a case originating from the jurisdiction of Barbados. In this case, the Barbados Court of Appeal held that in view of the similarity of the family law legislation in Australia and Barbados, Australian precedents should be followed and that English case law as a general rule should not be relied upon in applications to the court for an alteration of interests in property. The *Barbados Family Law Act*[70] takes as its model the 1975 *Family Law Act of Australia*[71], with the long title of the Act explaining its intention of reforming the law relating to the dissolution and nullity of marriage,

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[67] Ibid.
[68] Ibid.
[69] *Proverbs v Proverbs* (2002) 61 WIR 91
[70] Barbados Family Law Act, Cap 214.
[71] Australia Family Law Act 1975.

judicial separation and restitution of conjugal rights and to certain other related matters, as well as providing for counselling with a view to facilitate reconciliation in matrimonial causes and, in relation thereto and for matters connected with the parental rights and the custody and guardianship of children. According to the court in *Proverbs,* there was no doubt that the act had radically and fundamentally transformed family law in Barbados, eliminating in its wake many traditional concepts, notions and practices. For example, divorce based on the concept of a matrimonial offence and the attribution of fault to a party "had now been consigned to the pages of legal history."[72] The sole ground for dissolution of marriage was now irretrievable breakdown of the marriage. Furthermore, the court noted that gender imbalance in family law had been replaced by an all-pervasive statutory philosophy of gender neutrality and the sociological reality of unions other than marriage, popularly called 'common-law marriages' was now firmly recognised and entrenched in the law of Barbados.[73]

The Court then went on to consider that a fundamental aspect of the several reforms introduced by the Barbados family legislation was the establishment of a regime for the exercise of judicial discretion as it relates to the division of the property of the parties to a marriage or union other than marriage.[74] The court observed that it was now empowered to alter the interests of parties in such property by the application of an equitable discretion, guided by specific statutory criteria. On this basis, the court then went on to consider the applicability of precedents and whether seeking guidance from English cases would be helpful in determining applications under section 57 of the Act which gives the court the authority to make an order to alter the interests of the parties in the property, such as an order for a settlement of property in substitution for any interest in the property or an order requiring either or both of the parties to make, for the benefit

[72] *Proverbs* (see n. 69, p. 86), 96.
[73] Ibid, 115.
[74] Ibid, 97.

of either or both of the parties or a child of the marriage or union, such settlement or transfer of property as the court determines.[75] The court went on to hold that Australian precedents should be followed and that English cases should not as a general rule be relied upon in applications under section 57, although they might be relevant and useful on applications under section 56, which addresses the jurisdiction of the court to make declarations as to title or interest in property.[76] The court showed its inclination to follow already established local jurisprudence in justifying its decision by stating:

> This decision was arrived at by considering that two previous Chief Justices, Sir William Douglas and Sir Denys Williams, have followed the Australian precedents and we see no reason to depart from the view of those distinguished and learned judges; see *Franklin v Franklin* (unreported), *Bartlett v Bartlett* (unreported), and *Moseley v Moseley* (1986) 21 Barbados LR 14. A little more than a year after the commencement of the Family Law Act, Sir William Douglas CJ offered sage words of advice in Franklin. He observed: *"In dealing with cases under the Family Law Act, English cases can provide little guidance because the Act closely follows Australian legislation which represents a new departure requiring a different approach from that required by the repealed Matrimonial Causes Act."* [77]

The court also acknowledged that House of Lords cases such as *White v White*[78] referred to leading Australian cases by way of an examination and comparison of the historical approaches under English and Australian legislation with regard to determining whether there was any legal presumption of equal division when awarding ancillary relief. The Barbados court however held that this approach by the House of Lords was as a result of that court grappling with the presumption, and moreso because it had strenuously held that in property settlement matters the starting point was equality of division, which was a view adopted by Australia in the early days of their Family Law Act but was eventually

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[75] Ibid, 113.
[76] Ibid, 117.
[77] Ibid, 115.
[78] *White v White* [2000] UKHL 54, [2000] 3 WLR 1571.

firmly rejected by the High Court of Australia in several cases where it was confirmed that there is no presumption of equal division.[79]

4. Family Courts and Juvenile Trials

Ideally, the widely accepted model of a family court in the Commonwealth Caribbean follows the British ideology of a 'user friendly' court with the characteristics of being able to protect members of a family from physical, emotional or economic harm; to assist families which have broken down with adjusting to their new lives after being separated; and to encourage and support family life.[80] From the perspective of national family policy, it should be important to recognise that a family court system ought to have the responsibility to help families at the stage prior to problems developing to the extent which would lead to irretrievable breakdown of the family unit. Such a system would therefore focus on prevention through guidance and counselling, and therefore would have a multi-disciplinary approach by merging social and legal services into its functions, with the objectives of this approach being the protection of the welfare of family members and by extension the prevention of the dissolution of the family. The Chief Magistrate of St. Vincent and the Magistrate for the Family Court has also expressed the opinion that legal aid should be available even for family court and divorce matters as many couples do not consider divorce and continue to live together because they cannot financially afford a divorce.[81] It appears as though no common regional stance has been taken at CARICOM level regarding the necessity to create family courts across the Commonwealth Caribbean. The Chief Justice of Barbados for instance has stated that because of that country being a small jurisdiction, not enough family-related matters

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[79] *Proverbs* (see n. 69, p. 86), 116.

[80] John Eekelaar, *Family Law and Social Policy* (London: Weidenfeld & Nicholson, 1984), 24-26.

[81] Antoine, *Commonwealth Caribbean Law and Legal Systems* (see n. 20, p. 76), 321.

reached the ordinary courts and therefore it would be difficult to justify the creation of a specialized family court.[82] This position contrasts to that adopted by St. Vincent and the Grenadines, another small jurisdiction which has established a family court.

The first family court to be established in the Commonwealth Caribbean region was in Jamaica following the passing of the *Judicature (Family Court) Act*.[83] This act provided for a specialized court with jurisdiction over all legal proceedings which concerned family life, other than divorce proceedings. More recently, a 2004 pilot project to set up a family court in Trinidad and Tobago resulted in the permanent establishment of a specialized family court in 2011. The Trinidad and Tobago model arguably sets the standard for other jurisdictions in the region which hope to establish a family court. The court was not established by any legislation, but instead is somewhat of a unified court in which judges from the High Court as well as magistrates adjudicate on family related matters. Other than judicial adjudication, the court provides in-house services of social workers, probation officers and mediators. Judges or magistrates have the option of referring parties to the proceedings to these services, and in addition, individual members of the public also have access to counselling and mediation services without having to initiate court proceedings or employing legal counsel. Rules of Court in the form of the *Family Proceedings Rules (1998)*[84] has also been established to govern proceedings. A recurring theme in these Rules is that emphasis ought to be placed on resolving disputes by mediation and agreement wherever possible instead of resorting to litigation. The Rules provide that the Court has jurisdiction to take all practicable steps to encourage the parties to reach agreement on any disputed matters and, in particular, may refer the parties

[82] Ibid, 73.
[83] Jamaica Judicature (Family Court) Act 1975.
[84] Trinidad and Tobago Supreme Court, *Family Proceedings Rules* (Port-of-Spain: Trinidad, Supreme Court, 1998).

to mediation.[85] Importantly Rule 14.1[86] provides that the Court has the ability to actively manage cases on a wide range of issues including encouraging the parties to use the most appropriate form of dispute resolution including mediation, if the court considers that appropriate and by facilitating the use of such procedures in addition to encouraging the parties to cooperate with each other as to the parenting of any children and in the conduct of proceedings. Authority is also given by the *Mediation Act* 2004[87] to the judge or magistrate to refer parties to mediation by a certified mediator in any family matter other than a criminal matter. Furthermore, under the *Family Proceedings Act* 2004[88], a court may refer a matter or any aspect of the matter to mediation or to the unit responsible for social services in the court, or to a qualified professional. The court has also attempted to construct a user friendly environment and one which does not convey the image of an institution of adversarial nature. Instead, the ambience of the building is one which aims to produce a relaxing effect contrary to the general apprehensions associated with a court room. This is well described by former Chief Justice of Trinidad and Tobago, Michael de la Bastide, who has written:

> In the first place, the interior design, décor and furniture of the building have been selected with a view to producing a soothing and relaxing effect. Three pastel colours are used throughout the building. The waiting area outside the hearing-rooms on the first floor has the ambiance of a garden. There is a profusion of tropical plants in planters and seating accommodation is provided by garden benches. The third floor on which the social workers, mediators and probation officers are located, is particularly light and airy with lots of sunlight entering through large windows and

[85] Ibid, rule 14.1.
[86] Ibid.
[87] Trinidad and Tobago Mediation Act 2004, Chapter 5:32 of the Laws of Trinidad and Tobago.
[88] Trinidad and Tobago Family Proceedings Act 2004, Chapter 46:09 of the Laws of Trinidad and Tobago.

> French doors. Indeed there is very little in the building to suggest to the lay users of the Court any resemblance to the court-houses with which they would be familiar.[89]

Likewise, in Jamaica, the family court is located separately from other courts, waiting rooms are equipped with infant beds and provisions are also made for courts to be conducted in areas other than the ordinary court rooms. Like the Trinidad and Tobago Family Court, persons may engage the court services before deciding on litigation. Various support services which the family court and the public have access to as part of the court's operations include the Child Care and Protection Division of the Government, the Adoption Board, the Probation Department, Family and Marriage Counselling Departments and the Legal Aid Clinic. Belize also has a commendable model, whereby under the *Belize Family Courts Act*[90], a person who is appointed as a judge in the family court would be deemed to be suitable to deal with family matters by reason of his training, experience and disposition.[91]

At present, the Commonwealth Caribbean territories which have functional family courts are Jamaica, Trinidad and Tobago, St. Vincent and the Grenadines, St Lucia and Belize. However, there is currently no regional study which collectively assesses the success and experiences of those territories which have established family courts. This situation has been well summed up by Antoine, who writes:

> It is difficult to ascertain whether the family courts in the region are functioning well and obtaining their objectives. One could argue that the Jamaican court has learnt from the mistakes of its counterparts in other jurisdictions, such as Canada, the USA and the UK. There, it was believed that the low status and priority accorded to such courts undermined their effectiveness. Hence, the Jamaican court has been afforded a high enough status and power for it to function effectively and gain respect. But, in St Lucia and St. Vincent, the status of the court is that of an inferior court. Note too

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[89] Michael de la Bastide, 'Caseflow Management in a Unified Family Court; A Caribbean Experiment', *Journal of the Commonwealth Magistrates and Judges Association*, 16:3 (2006), 11-18, 15.
[90] Belize Family Courts Act 1989, CAP 93 of the Laws of Belize.
[91] Ibid, s4(2)(c).

> that in St Lucia, aspects of family law are contained in the Civil Code, as a result of St. Lucia's civil law influences. However, staffing and proper facilities appear to be problematic. Further the concept of 'specialised' tends to have the disadvantage that it creates connotations of an extra-legal character. The Family court has suffered somewhat from this stigma. Its sphere of reference, the socio-economic unit of the family, tends to exacerbate the image. In St. Lucia, there are already complaints that attorneys do not take the court seriously.[92]

Juvenile Trials

Across the Commonwealth Caribbean, the procedure following the arrest of a juvenile as well as punishment is different from that of an adult offender. The statutory definition of a juvenile in Antigua, Barbados, St. Lucia and St. Vincent refers to persons under the age of 16 and includes both a 'child' and 'young person.'[93] In other territories such as the Bahamas, Dominica, St. Kitts and Nevis and Trinidad and Tobago, a juvenile is defined by law as a person under the age of 18, while in Guyana and Jamaica, a juvenile is classified as a person under the age of 17.[94] In Grenada, although there is no specific act addressing juvenile justice, section 84 of the *Grenada Criminal Procedure Code* defines a 'child' as being under the age of 14 years, while a young person is 14 to under 16, 17 or 18 as the case may be.[95] The age of criminal responsibility also varies across the Commonwealth Caribbean, with countries such as Barbados, Grenada and Trinidad and Tobago maintaining the common law position of seven years, whereas in Guyana it is 10 years, and St. Lucia and Jamaica it is 12 years.[96]

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[92] Antoine, *Commonwealth Caribbean Law and Legal Systems* (see n. 20, p. 76), 355.
[93] Dana Seetahal, Commonwealth Caribbean Criminal Practice and Procedure (London: Cavendish, 2001), 453.
[94] Ibid, 453-454.
[95] Ibid.
[96] Ibid, 454.

The provisions which address the handling of juveniles following arrest are generally similar across the region.[97] An arrested juvenile is detained separately from adults and is prevented from interacting with adult prisoners. Juveniles arrested for offences which do not involve homicide and who cannot be immediately be brought before the court is required to be released in the care of his parent or guardian unless this is contrary to the interest of justice. In the event that the juvenile is not released on bail, he his remanded in a children's home or a detention place for youth offenders, but not in a prison.[98] The parent or guardian of a juvenile who has been arrested and charged is also required to attend court. Juveniles are tried in a juvenile court, with the law in some jurisdictions prohibiting juvenile courts from being held in the regular magistrates' court buildings.[99] Hearings are held *in camera*, and the reporting of proceedings as well as the names of the offender and victim is not publicised. Generally, the trial procedure at the juvenile court is not as stringent as the regular magistrate's court.[100] The parents of the juvenile for instance may ask questions of the witnesses, and following the conclusion of the prosecution's case the juvenile is permitted to make a statement instead of giving evidence on oath. The court generally also relaxes rules of evidence with the intention of making the proceedings less adversarial.

A child who is found guilty of an offence is not imprisoned, but is instead sent to a training school or a place of detention for a period not exceeding three years. A young person who is convicted of a criminal offence may generally be imprisoned, but usually for a period no more than three months as determined by statute.[101] Other than custodial sentences, the court may instead chose to appoint a probation officer to supervise the offender for up to three years; discharge the offender where he enters in to a recognisance

[97] Ibid.
[98] Ibid, 455.
[99] Ibid.
[100] Ibid.
[101] Ibid, 456.

for good behaviour; commit the offender to the care of a fit person; send the offender to an industrial school; order the parent or guardian to give security for the good behaviour of the child or order the offender or the parent or guardian to pay a fine.[102] The court would consider the nature of the offence, the age of the offender and the interests of justice in determining the punishment for the juvenile.[103]

5. Effects of International and CARICOM Law on regional conditions

Looking towards the future development of family law, this section will consider how Commonwealth Caribbean legal norms may be positively influenced by international and Caribbean Community (CARICOM) laws.

(i) The Convention on the Rights of the Child and its impact on the Commonwealth Caribbean.

International law in the form of the United Nations Convention on the Rights of the Child (CRC)[104] has placed the onus on Commonwealth Caribbean governments to adopt and adapt to human rights progress in the arena of the law relating to children in a global context. To highlight the importance of this convention in terms of children's rights within the international landscape, according to UNICEF, the Convention on the Rights of the Child (CRC) is:

> the result of 10 years of consultations and negotiations between government officials, lawyers, health care professionals, social workers, educators, children's support groups, non-governmental organizations and religious groups from around the world.

[102] Ibid.
[103] Ibid.
[104] United Nations, *Convention on the Rights of the Child* (Geneva: United Nations, 1989).

> More countries have ratified the convention than any other human rights treaty in history.[105]

All Caribbean jurisdictions are parties to the CRC. Commonwealth Caribbean states have generally taken the stance that the CRC is not justicable before national courts as a result of the Common Law position that a treaty does not form part of domestic law unless it is incorporated into domestic law by legislation. Where states have signed the CRC, the expectation is that they are required to align existing laws with the provisions of the CRC. Yet, the importance of the applicability of the CRC principles to the Commonwealth Caribbean was evident in *Naidike & Ors v. Attorney General of Trinidad and Tobago*[106], where the Privy Council based its decision on Article 3.1 of the CRC which states that in all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration. It was from this perspective that the Privy Council in *Naidike* ruled that an immigration decision to deport a parent who did not possess a work permit had to be balanced against the impact upon family members as required under Articles 3 and 9 of the CRC, as well as the notion of respect for family life as expressed by s 4(1) of the Constitution of Trinidad and Tobago.[107]

The various Commonwealth Caribbean governments which have ratified the CRC have in effect declared their interest in promoting and protecting the rights of children, despite the fact that express provisions of the convention generally are yet to form part of their domestic laws. However, Commonwealth Caribbean countries are internationally obliged to implement the legislative and administrative measures which are needed to

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[105] UNICEF, Pamphlet on The Convention on the Rights of the Child: Questions Parents Ask (New York: UNICEF, Date Unknown), 1.
[106] Naidike & Ors v. Attorney General of Trinidad and Tobago [2004] UKPC 49, [2005] 1 AC 538.
[107] Ibid, [80].

give effect to the provisions of the CRC within the respective territories. The process of ratification involves a widespread review process, as explained by UNICEF:

> When countries ratify the convention, they agree to review their laws relating to children. This involves assessing their social services, legal health and educational systems, as well as levels of funding for these services. Governments are then obliged to take all necessary steps to ensure that the minimum standards set by the convention in these areas are being met. In some instances this may involve changing existing laws or creating new ones. Such legislative changes are not imposed from the outside, but come about through the same process by which any law is created or reformed within a country.[108]

A UNICEF Report Entitled *"The Convention on the Rights of the Child Fifteen Years Later - The Caribbean"*[109] has been extremely critical of the Commonwealth Caribbean governments who have ratified the convention, but are yet to put sufficient measures in place to see to its incorporation into domestic law. The report observed that although countries in the Caribbean have significantly advanced in their recognition of the human rights of children, some children continue to frequently suffer violence, abandonment, abuse, mistreatment and exploitation.[110] The report cited occurrences such as the transformation of family structures, migration, reduction of social investment, unfair trading agreements and the fragility of new forms of jobs has having severe repercussions on the lives of children.[111] UNICEF has also argued that the relevance of the CRC in Commonwealth Caribbean countries should be reconsidered in light of its status in international law to the effect that treaty law and customary law are overlapping areas of law, and not mutually exclusive categories[112]. Consequently, a norm or principle may have the effect of being recognized by both treaty law and customary law. Therefore,

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[108] UNICEF, *Pamphlet on The Convention on the Rights of the Child* (see n. 105, p. 96).
[109] UNICEF, The Convention on the Rights of the Child Fifteen Years Later: The Caribbean (Panama City: UNICEF, 2004).
[110] Ibid, 6.
[111] Ibid.
[112] Ibid, 11.

it is arguable that ratification of the CRC by the majority of states forming the international community provides compelling evidence to suggest that it has become customary international law. Despite the treaty provisions of the CRC generally not being incorporated into domestic law in the Commonwealth Caribbean, customary international law forms part of the common law, and therefore can be applied by the courts once application is not incompatible with any act of parliament.

Although Trinidad and Tobago has ratified *the United Nations Convention to Eliminate All Forms of Discrimination against Women (CEDAW)*[113], and the CRC, it was reported in 2013 that the Government had not sent in the obligatory reports to the UN since 1990.[114] Professor Cees Flinterman, member of the UN Human Rights Committee speaking at a seminar on 'Human Rights, Women and Children' held at the Caribbean Council of Legal Education, Hugh Wooding Law School in Trinidad commented, "Once that state accepted the provision, it is expected to hold them accountable. Children and Women's rights conventions are protected under instruments. These states are expected to submit regular reports every four years. They are expected and obliged to submit a report on what they have done to the committees."[115] Professor Rhoda Reddock, professor of Gender, Social Change and Development from the University of the West Indies (UWI) and former head of the Institute of Gender and Development Studies (IGDS) at UWI, listed the *Marriage Act*[116] which allowed for the marriage of minors, and the inability of a National Gender Policy to be established were two of the major issues that affected women and children. The Trinidad and Tobago Parliament has however since passed the Miscellaneous Provisions (Marriage) Act No. 8 of 2017 which served as an

[113] Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13, (CEDAW).
[114] Rachael Espinet, 'TT has not sent reports on two UN human rights groups' *Trinidad Newsday* (Port-of-Spain, 5 December 2013).
[115] Ibid.
[116] Trinidad and Tobago Marriage Act 1923, Chapter 45:01 of the Laws of Trinidad and Tobago; Ibid.

Act to amend the Marriage Act, Chap. 45:01, the Muslim Marriage and Divorce Act, Chap. 45:2, the Hindu Marriage Act, Chap. 45:3, the Orisa Marriage Act, Chap. 45:4 and the Matrimonial Proceedings and Property Act, Chap. 45:51, by raising the legal age of marriage to 18, effectively outlawing child marriage.

Quite disturbingly, reports have pointed to the widespread prevalence of violence directed against children across the region.[117] A statement issued by the CARICOM Secretariat in 2012 echoed its growing concern about the alarming levels of violence against young children. The statement referred to a 2003 World Bank's Caribbean Youth Development Report which noted that the Caribbean had the earliest age of sexual "debut" in the world with many young persons demonstrating early sexual behaviour as a consequence of child abuse from as early as 10 years old, and in some cases even earlier.[118] More recently, a 2009 UNICEF study on child sexual abuse in the Eastern Caribbean indicated that this problem was escalating in the region and identified emerging forms of abuse such as the use of young boys in an organized network to provide sexual services to cruise ship passengers.[119] The Secretariat indicated that the most disturbing of the findings common to all the studies was that child sexual abuse in the region is shrouded in secrecy, aided and abetted by cultural 'taboos' and feelings of guilt by victims.[120] Added to this the Secretariat noted that sexual violence occurred in institutions that are perceived as places of safety such as orphanages, detention centres, schools, foster homes and family homes.[121] Incest and child molestation committed by family friends and figures in authority was often deemed private matters, with the victim

[117] CMC Feature on Caribbean Rights, '*Region Alarmed at increased violence against children'*, CANA News Online (7 September, 2012).
[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] Ibid.

often being transformed into the villain, triggering irreparable social and psychological damage from having to live in silence

Indeed, a solemn challenge presently facing the region is an inadequate legislative framework and a lack of public policy and programmes to protect children and young persons from different types of violence. Furthermore, there also exists the challenge of the region's capacity to combat the widespread occurrence of violence against children being limited by a lack of information and data collection mechanisms which would inform the planning and implementation of effective violence prevention strategies. Also of urgent need is the formation of mechanisms to track, monitor and evaluate CARICOM Member States in relation to progress made with regard to their commitments and programmes addressing children and youths.

(ii) Gender based violence and gender equality

There exists several treaties acceded to by Commonwealth Caribbean states which address gender based violence and gender equality The principle of equality of men and women is recognised by the *Charter of the United Nations* which in its preamble states its goal "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women."[122] The *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*[123] was adopted in 1979 and compels State parties in Article 2 "to condemn discrimination against women in all its forms and to pursue by all appropriate means and without delay a policy of eliminating discrimination against women." The *Declaration on the Elimination of Violence against Women (DEVW)*[124] as adopted by the UN General Assembly in 1993

[122] Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
[123] UN CEDAW (see n. 113, p. 98).
[124] Declaration on the Elimination of Violence against Women, 20 December 1993, GA/RES/48/104 (DEVW).

states that violence against women is a violation of human rights and recommends strategies to be undertaken by member states to eliminate it. Furthermore, the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para")*[125] has been ratified by the Bahamas, Barbados, Dominica, Guyana, St. Kitts and Nevis, St. Lucia and Trinidad and Tobago. Article 1 of this convention states:

> For the purposes of this Convention, violence against women shall be understood as any act or conduct, based on gender, which causes death, or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.[126]

Furthermore, Article XII of *CARICOM Charter of Civil Society for the Caribbean Community*[127], which is a non-binding, regional human rights declaration, urges the promotion of policies and measures aimed at strengthening gender equality. This article recognises that women have equal rights with men in the political, civil, economic, social and cultural spheres, with such rights including the right to legal protection and just and effective remedies against domestic violence, sexual abuse and sexual harassment.

Most Commonwealth Caribbean countries are parties to CEDAW and the Convention of Belem do Para. Under these conventions these countries have committed to undertake necessary measures within its borders to achieve the full realization of the rights outlined in the conventions. Such measures include legislative action to prevent and punish acts of violence against women, improving access to justice by establishing fair and effective legal procedures for victims and establishing the necessary legal and administrative mechanisms to ensure that victims of gender-based violence have access

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[125] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 9 June 1994, 33 ILM 1534 (1994), (Belém do Pará).
[126] Ibid, art. 1.
[127] CARICOM Secretariat, *Charter of Civil Society* (Georgetown: CARICOM Secretariat, 1997).

to just and effective remedies.[128] Guyana has directly incorporated the provisions of CEDAW and the Convention of Belem do Para into its domestic law through a 2003 constitutional amendment, which guarantees the protection of those rights set out in human rights conventions to which that country is a party.[129]

A particular area of progressive reform has been in the arena of sexual offences and corroboration warnings. In *Pivotte (Anthony) v R*[130], Satrohan Singh JA referred to a statement in *R v Henry & Manning*[131] which supports a mandatory warning to the jury about corroboration in sexual offences cases. In *Henry & Manning*, the court took the position that human experience shows that girls and women sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute.[132] The Guyana Court of Appeal approved the opinion in *Pivotte* that sexual neurosis, fantasy, spite or refusal to admit consent because of shame are some of the reasons given for why women and girls lie.[133] This position was again adopted by the Guyana Court of Appeal in *Williams (Eric) and Dindial Khublall v The State*[134] with the court approving the summation in *R v Stewart*[135] that children and women hallucinate and tend to make up stories, so it became the practice over the years to look for corroboration before convicting.[136] However, this practice requiring the trial judge to give the jury specific direction and warning regarding the evidence of the complainant in sexual offences matters to the extent that it would be dangerous to convict on uncorroborated evidence was overturned by the Privy Council in *R v Gilbert*[137] where it was held that the

[128] UN CEDAW (n. 113, p. 98), art 24; Convention of Belem do Para (n. 125, p. 101), art. 7.
[129] Article 154A of the *Constitution of the Co-operative Republic of Guyana* 1989 as amended by the Constitution (Amendment) (No. 2) Act 2003:10.
[130] *Pivotte v R* (1995) 50 WIR 272 (Guyana HC).
[131] *R v Henry & Manning* (1968) 53 Cr App Rep 150.
[132] Ibid, 153.
[133] *Pivotte v R* (1995) 50 WIR 114 (Guyana CA), 118.
[134] Williams (Eric) and Dindial Khublall v The State (1997) 57 WIR 164.
[135] *R v Stewart* (1986) 83 Cr App Rep 327.
[136] *Williams* (see n. 134, p. 102), 168.
[137] *R v Gilbert* [2002] UKPC 17, (2002) 61 WIR 174.

mandatory corroboration warning did not contribute to the fairness of trial neither did it aid the reaching of safe verdicts, with the judge having the discretion to determine what warning, if any, is appropriate. Although legislating for gender equality appears to either be weak or missing from regional domestic legislation as well as Commonwealth Caribbean constitutions, in some instances regional courts have been able to consider and adopt international practices to advocate gender equality. For instance in *Bank Employees Union v Republic Bank Ltd*,[138] the Trinidad and Tobago Industrial Court considered the ILO Conventions and international best practice as related to appropriate workplace conduct to pronounce judgment that an individual who had sexually harassed a colleague should have been dismissed as his actions were contrary to good industrial relations practice.

CARICOM draft legislation on issues affecting women

CARICOM has drafted model legislation on issues affecting violence against women in the areas of sexual offences[139], domestic violence[140] and sexual harassment[141]. In the area of sexual offences, the model legislation provides for *in camera* hearings with the effect being to encourage victims to report offences of a sexual nature and to attend trials.[142] While the legislation provides to the public to be excluded during hearings the judge has authority to permit the presence of a member of the public where that presence is requested by the complainant or the accused.[143] The model legislation also places restrictions on the reporting of the identity of the accused or the victim following the accused being charged with an offence, except in the instance where the

[138] *Bank Employees Union v Republic Bank Ltd*, [25 March 1996] TT Industrial Court POS TD 17/95.
[139] CARICOM, *Model Legislation on Sexual Offences* (Georgetown: CARICOM Secretariat, 1997).
[140] CARICOM, *Model Legislation on Domestic Violence* (Georgetown: CARICOM Secretariat, 1997).
[141] CARICOM, *Model Legislation on Sexual Harassment* (Georgetown: CARICOM Secretariat, 1997).
[142] CARICOM, *Model Legislation on Sexual Offences* (Georgetown: CARICOM Secretariat, 1997), Explanatory note.
[143] Ibid, 21(2).

victim or the accused makes an application to the court to permit such publication, or after the accused has been tried or convicted of the offence.[144] Any person who discloses the identity of the accused or the complainant may be convicted of an offence and is liable on conviction to a fine or imprisonment.[145] The model legislation also restricts the adducing of evidence as to the sexual history of the complainant as well as empowers the court to prohibit the publication of certain details of the alleged act.[146]

The draft model addressing domestic violence has been modelled to similar legislation in New Zealand.[147] It was prepared on the basis that there is a need for legislation to deal specifically with the matter of domestic violence and to provide remedies for victims of domestic violence to mitigate its effects.[148] The model legislation addresses men and women who are or have been married to each other or who are or had been living together as man and wife, as well as children, with the child being defined as a child of both parties to a marriage, a child of an unmarried couple or a child who has been accepted as a member of the family or of the couple's household. In this area, the model legislation provides remedies which include the granting of a protection order[149], occupation order[150] and tenancy order[151]. The court may make a protection order if it is satisfied that the respondent has used or threatened to use violence against or caused physical or mental injury to a prescribed person and is likely to do so again; or having regard to all circumstances, the order is necessary for the protection of a prescribed person and the court, may if it thinks fit, attach a power of arrest to the order.[152] An occupation order may be granted by the court in the instance that it is satisfied that it is necessary for

[144] Ibid, 26(1)
[145] Ibid., 26(2).
[146] Ibid, 23 and 25(1).
[147] CARICOM, *Model Legislation on Domestic Violence* (Georgetown: CARICOM Secretariat, 1997), Explanatory note.
[148] Ibid.
[149] Ibid, 4.
[150] Ibid, 7.
[151] Ibid, 11.
[152] Ibid, 4(2).

the protection of the prescribed person or that it is in the best interest of the child. The occupation order grants an exclusive right to live in the household residence to the prescribed person named in the order. That person is therefore entitled to exclude the respondent from the household residence.[153] A tenancy order is intended to vest the tenancy in the applicant for the order, thereby allowing for the exclusion of the respondent.[154] However, the applicant would be bound by the terms and conditions of the tenancy at the time when the order is made.[155] Similar to an occupation order, the tenancy order would only be made where the court is satisfied that it is necessary for the protection of the applicant or it is in the best interests of a child of the family.[156]

However, despite the existence of the CARICOM draft legislation, according to Margarette May Macaulay[157], the domestic legislative provisions existing across the region do not grant protection and redress for victims in keeping with Article 2 of the Convention of Belem do Para which states:

> Violence against women includes physical, sexual and psychological violence:
>
> a. that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse;
>
> b. that occurs in the community and is perpetrated by any person, including rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health or any other place; and

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[153] Ibid, 9.
[154] Ibid, 13(1).
[155] Ibid.
[156] Ibid, 11(2).
[157] Margarette May Macaulay, 'Violence against Women in the Commonwealth Caribbean - CARICOM Model Legislation in areas of Sexual Offences, Sexual Harassment and Domestic Violence - Their Use in the Framing of National Legislation and a Comparison with International Standards' in Andrew Byrnes and Kirstine Adams (eds.), *Commonwealth Secretariat, Gender Equality and the Judiciary: Using International Human Rights Standards to Promote the Human Rights of Women and the Girl-child at the National Level* (Commonwealth Secretariat: London, 2000), 276.

c. that is perpetrated or condoned by the state or its agents regardless of where it occurs.[158]

Macaulay views the legislative provisions which exist in the region as falling short of these provisions, especially in relation to the restrictive definitions of dwellings as well as the non-inclusion of other inter-personal relationships independent of parties sharing the same residence, as well as the failure of many countries in the region to enact sexual harassment legislation.[159]

Work of the UN Women Multi-Country Office (Caribbean)

In support of the DEVW, the UN Women Multi-Country Office (Caribbean) has encouraged the development of national action plans to address gender based violence in Antigua and Barbuda, Belize, Grenada, Jamaica and St. Kitts and Nevis and the revision to domestic violence laws across region in order to respond to gender based violence.[160] According to the UN Women Multi-Country Office (Caribbean) website, its UN Women 2014-2017 programming is targeted primarily at prevention initiatives that are systematically implemented by national and community partners.[161] These initiatives are aimed at addressing behaviours shaped by gender norms supporting definitions of masculinity and sanctioning the use of aggressive and violent behaviour by men and which undermine the agency and self-determination of women.[162] In Jamaica, UN Women leads the development and coordination of a joint programme on eradicating Gender-Based Violence through the implementation of a national strategic action plan to eliminate gender based violence, with focus on establishing protocols, data management

[158] Ibid.
[159] Ibid.
[160] United Nations Development Program and United Nations Entity for Gender Equality and Empowerment of Women, *The Commitment of the States: Plans and Policies to Eradicate Violence against Women in Latin America and the Caribbean* (Panama: UNDP, 2013).
[161] Ibid.
[162] Ibid.

and required capacities to implement policies and legislation.[163] The Governments of Belize, Grenada and Antigua and Barbuda have received grants from the UN Trust Fund to End Violence against Women to support implementation of these national action plans.[164] The Jamaica AIDS Support for Life (JASL) project has also received an NGO grant to strengthen the implementation of laws, policies and action plans for "Expanding Gains to Decrease and Prevent Violence against Women in the Context of HIV and AIDS."[165] Following from an on-going Memorandum of Understanding (MOU) with CARICOM and in partnership UNDP Sub-regional Office for Barbados and the OECS, UN Women has also supported the development of a Caribbean model of Prevalence Surveys on Gender-Based Violence based on a global methodology development by the World Health Organisation (WHO).[166]

Conclusion

Defining the Commonwealth Caribbean family is arguably an exercise which contributes to the further establishment of a regional identity as a result of its unique distinctiveness. Measured against the aim and objective of the thesis, it is suggested that regional judicial decisions have indicated that judges are willing to consider local conditions and regional as well as international norms in shaping their judgments. This is important as it allows the rule of law to be adaptable to localized conditions and customary traditions. As discussed, regional judicial decisions have indicated that judges are willing to consider local conditions and regional as well as international norms in shaping their judgments. The establishment of specialised family courts and juvenile courts also demonstrates that states in the region have identified the benefits of fostering

[163] Ibid.
[164] Ibid.
[165] Ibid.
[166] Ibid.

a court system to address family and juvenile matters that is not entirely based on adversarial approaches and punitive justice. However, more work needs to be done in terms of integrating international treaty commitments into domestic law, as this would not only indicate a willingness to meaningfully follow up in international obligations, but also give the judiciary a greater sense of empowerment in the exercise of its functions as it relates to upholding international human rights norms in a domestic context. What is evident however is the normative experience of the family which might be constructed through interaction with informal institutions and custom is influential in determining the behaviour of those individuals in the context of their belonging to a society. As Ehrlich states, "…the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself."[167] Overall, what the rule of law should ensure when it comes to the family is that there is no uneven compromise between custom and institutionalized law. Where uneven compromise is the case, there is the threat of the courts being undermined as the forum for settling family disputes. Such a scenario yet again reminds of the problems associated with incorporating transplanted law into a judicial system where there is the intent to resolve social disputes according to fixed parameters.

[167] Eugene Ehrlich, *Fundamental Principles of the Sociology of Law* (Cambridge: Cambridge University Press, 1936), Foreword.

CHAPTER III

ACCESS TO LAND AND TENURE SECURITY IN THE COMMONWEALTH CARIBBEAN

I do not think anybody can say: "this land is mine." Only God can say: "this is mine." What I want to ask the Minister is: "where is the paper of the government that says that [the land] is yours?" His answer is going to be: "first, 'the law is the law' and second, 'without law there is no order' [. . .]" That's what they will say, but I still want to ask this question.

Indigenous villager from Galibi. Personal, communication, March 4, 1999[1]

Introduction

The objective of this chapter is to look at various issues surrounding access to land and tenure security in the Commonwealth Caribbean. This is important in terms of the aim and objective of the thesis as the rule of law has been influenced by the shared colonial history of the treatment of land in the region, which in essence, sets a baseline for the present-day inadequacies of regional land ownership structures. The shared colonial history of the treatment of land in the region in essence sets a baseline for the present day inadequacies of regional land ownership structures. It is from this background that this chapter will consider how real property rights have been treated in the Commonwealth Caribbean. It will consider that policy treatment towards matters such as

[1] Quote taken from Ellen-Rose Kambel, 'Land, Development, and Indigenous Rights in Suriname: The Role of International Human Rights Law' in Jean Besson and Janet Momsen (eds.) *Caribbean Land and Development Revisited* (New York: Palgrave Macmillan, 2007), 69.

traditional land tenure systems and forced evictions is inadequate and that there is a need for reform geared towards the legal recognition of customary land use. The chapter will conclude by suggesting that a hybrid land tenure system is needed to allow for the peaceful co-existence of a largely Anglo-derived land tenure structure and customary land tenure arrangements.

1. Colonial Background and Legacy

The Caribbean region shares the common history of being "the oldest colonial sphere with the most extreme experience of colonisation."[2] The colonial expansion of Europe reached the Caribbean as early as 1492 when Columbus arrived in the Bahamas during his first of a series of expeditions on behalf of the Spanish monarchy.[3] At the time, the land across the Commonwealth Caribbean region was mainly settled by indigenous peoples of the *Lucayo, Taino* and *Maya* tribes.[4] The moment of Columbus's arrival marked essentially a land grab as the initial step in a succession of events which transformed the various islands into a profit making enterprise for their metropolitan owners. The occupation of the islands through the migration of European *conquistadores* indicated that the acquisition of land in the name of religion and expansion of empire was of substantial contrast to land being viewed as less of a commodity, but more as a spiritual, living entity closely connected to indigenous culture and customary use.

The origins of modern day land law in the Commonwealth Caribbean territories are founded in English common law, with Guyana and St. Lucia also drawing from

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[2] Jean Besson, 'History, Culture and Land in the English-speaking Caribbean' in Allan Williams (ed.), *Proceedings of the conference on Land in the Caribbean: Policy, Administration and Management in the English-speaking Caribbean* (Madison USA: Land Tenure Center, University of Wisconsin-Madison, 2003), 33.
[3] Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (New York: Routledge-Cavendish, 2008), 188.
[4] Ibid.

Roman-Dutch civil law.[5] It is from this background that the general treatment of property rights in the Commonwealth Caribbean follow a largely positivist approach, in the sense that property rights exist only to the extent by which they are recognised by the state. This approach follows the perspective of Bentham who has written, "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."[6] The territories inherited an Anglo-derived system based on the concept of 'tenure' which formed part of the feudal system introduced by the Normans to England after the 1066 conquest.[7] This system dictated that all lands were owned by the King, who had the authority to grant lands to his Barons in return for services such as the provision of soldiers. The Barons would also be able to grant lands which they received from the King to Lords, with Lords also being able to grant sub-tenancies. The number of sub-tenancies which could be granted was prohibited by the 1290 statute of *Quia Emptores*, and this restored the position of "the actual occupant of the land theoretically holding directly from the Crown, rendering services to no one, and looking to all intents and purposes like the absolute owner."[8] Wortley has argued that since land is the only indestructible object of property, the ownership of land carries with a special social obligation. He explains that this attitude stems from "an accepted truth in feudal England when the only absolute title to land was held by the King as *parens patriae* and apex of the feudal pyramid."[9] It is from this basis that Anglo-land law developed, with English law, evolving along the lines of recognising estates in land, as opposed to the absolute private ownership of land.[10] This approach to land changed in form with the 1925 Property Acts which provided that there would always be an owner to the land who was

[5] Ibid, 58.
[6] Jeremy Bentham, *The Theory of Legislation* (New York: Oceana Publications, 1975), 69.
[7] Gilbert Kodilinye, *Commonwealth Caribbean Property Law* (London: Cavendish, 2005), 3.
[8] Ibid.
[9] Benjamin Atkinson Wortley, *Jurisprudenc*e (Manchester: Manchester University Press, 1967), 307.
[10] Ibid.

capable of transferring his legal interest in the land to a purchaser.[11] These concepts of land tenure established in the law of the metropolitan travelled with colonisation and were implanted into the colonised territories. Furthermore, the principles introduced were imposed on the basis that they would override any existing forms of land tenure systems in the colonised territories.

In addition to the positivist approach to land tenure systems in the Commonwealth Caribbean during the colonial period, Gilbert notes that by the end of the 19th century, the position of international law also embodied the Euro-centric view of the positivist school that non-European societies held no sovereign claim over the territories which they inhabited.[12] In illustrating this, he cites several cases such as the 1847 decisions of *R v. Symonds* where the New Zealand Supreme Court commented that "the right of the native title owner is withdrawn, the soil vests entirely in the Crown for the behalf of the nation"[13] and the Supreme Court of New South Wales in *Attorney-General v. Brown* where it was declared that title was acquired by the Crown upon discovery and settlement.[14] This 'doctrine of discovery' formed a legal construct which was used as a "basis for the recognition of the superiority of their rights of ownership over the rights of the original inhabitants."[15] Exclusive title was therefore vested in the 'discoverer' and the original occupants of the land were deprived of their territorial sovereignty, "leaving them with a residual right of occupancy."[16] Indeed, the ideology exists that the material substance of colonialism is grounded in dispossessions and repossessions of land. Said in describing the essence of colonialism, has written:

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[11] Ibid.
[12] Jérémie Gilbert, Indigenous Peoples' Land Rights under International Law: From Victims to Actors (New York: Transnational Publishers, 2007), 59.
[13] *R v. Symonds* [1847] NZPCC 387.
[14] *Attorney General v. Brown* [1847] 2 SCR (NSW) App 30, (1847) 1 Legge 312.
[15] Gilbert, *Indigenous Peoples' Land Rights* (see n. 12, p. 112), 60.
[16] Ibid.

> Underlying social space are territories, land, geographical domains, the actual geographical underpinnings of the imperial, and also the cultural contest. To think about distant places, to colonize them, to populate or depopulate them: all of this occurs on, about, or because of land. The actual geographical possession of land is what empire in the final analysis is all about.[17]

Colonialism hence forced a reorientation of land and labour away from older customary uses. In the Commonwealth Caribbean, control of land ownership through colonisation was also connected to the capitalistic enterprise of the sugar trade. As discussed in the Introduction of this thesis, the 'Triangular Trade' facilitated the exchange of products from the Commonwealth Caribbean such as sugar and its by-products such as rum and molasses. Control of land was central to economic prosperity of the metropolitan in the colonies. According to O'Brien:

> By the end of the eighteenth century, the region had become the 'hub of the Empire,' with four-fifths of the income derived from Britain's overseas colonies emanating from these so-called 'sugar colonies.' At the same time, the sugar industry, with its demands for large plantations and a constant supply of fresh slaves, had radically altered the composition of the local population, which at the outset was mainly Anglo-Saxon, made up of the original settlers from England, and indentured labourers recruited from England, Scotland and Ireland, to make up for the absence of an indigenous population that could be put to work, living on small farms and engaged in a mixed agricultural economy. Following the introduction of sugar in the mid seventeenth century, however, the composition of this population changed completely as large parts of the region were given over to a system of large sugar plantations, worked by very large numbers of slaves, transported mainly from West Africa, under the direction of a few white men.[18]

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[17] Edward W. Said, *Culture & Imperialism* (London: Vintage Books, 1993), 93.
[18] Derek O'Brien, The Constitutional Systems of the Commonwealth Caribbean: A Contextual Analysis (London: Bloomsbury Publishing, 2014), 10.

Plantations during time of slavery have been described as "total economic institutions"[19] where there was "virtually no distinction between the organization that is the unit of production and the society."[20] As Toppin-Allahar explains, "The essential features of plantation economy – mono-crop production and export orientation – were therefore the key drivers of land values and land use patterns in the colonial Caribbean, both before and after emancipation."[21] The treatment of land by the legal system was therefore that of a commodity closely tied to the production of sugar cane, and according to Antoine, "The law continued to be unsupportive of the large black masses....mainly because it failed to adapt adequately to the needs of the newly liberated peoples who were landless, powerless, largely uneducated, culturally and psychologically emasculated and still tied to the plantation."[22] Richardson, in considering the report of the 1897 Royal Commission which was appointed to investigate the decline of the sugar industry similarly noted:

> While British officials were divided as to specific planning techniques or strategies, they were unanimous in their opposition to informal settlements scattered throughout the hills and mountains; widespread forest hamlets were inconsistent with central colonial control and represented locales that could encourage relapse into "African" livelihood patterns. Discussions of these points, further, reawakened fears in the region that were decades old. Releasing the black labour force from a subservient, supervised existence might easily lead to trouble....The problems associated with retrogressive "African" customs and behaviour, moreover, had been a staple of the testimony gathered by the royal commissioners, particularly in relation to villages in remote highland island interiors.[23]

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[19] Christine Toppin-Allahar, '"De Beach Belong to We!" Socio-Economic Disparity and Islanders' Rights of Access to the Coast in a Tourist Paradise', *Oñati Socio-Legal Series*, 5 (2015), 298-317, (p. 301).
[20] Ibid.
[21] Ibid, 302.
[22] Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (New York: Routledge-Cavendish, 2008), 24.
[23] Bonham C. Richardson, 'The Importance of the 1897 Royal Commission' in Jean Besson and Janet Momsen (eds.), *Caribbean Land and Development Revisited* (New York: Palgrave, 2007), 25.

As evidenced by the colonial sugar industry, it is arguable that the process of colonialism was a long-term venture in the conquest of space, and the transformation of nature into a commodity, akin to the proclamation by Marx that the soil had become "part and parcel of capital."[24] For Marx, the "wholesale expropriation of the agricultural population from the soil....created for the town industries the necessary supply of a 'free' and outlawed proletariat."[25] Harris, in analysing the work of French philosophers Deleuze and Guattari, suggests:

> The spatial energy of capitalism works to deterritorialize people, (that is, to detach them from prior bonds between people and place), and to reterritorialize them in relation to the requirements of capital itself (that is, access to land conceived as resources and freed from the constraints of custom, and to labour conceived as ordered, time-disciplined, abundant, and also unencumbered by custom).[26]

Within this economic, social and cultural context, the negative impacts arising from the colonial treatment of land in the Commonwealth Caribbean are widespread across the region, particularly in terms of how land is distributed and who has access to the land. For instance, following colonisation, there emerged a large population of landless peasants. These "squatter peasantries"[27] had been established in opposition to the plantations, particularly in the mountainous interior regions of the Greater Antilles.[28] As Besson explains:

> These early squatter peasants were wiped out by the escalating plantation system and replaced by postindentured "early yeomen," "protopeasant" plantation slaves, "runaway peasantries" (escaped slaves or maroons), and postslavery peasants in free villages and in posttreaty maroon polities. However, squatter peasants reemerged in

[24] Karl Marx, *Capital* (New York: International Publishers 1967) pt 8 ch 27.
[25] Ibid.
[26] Richard Colebrook Harris, Making Native Space: Colonialism, Resistance, and Reserves in British Columbia (Vancouver: UBC Press, 2011), 53.
[27] Jean Besson, '"Squatting" as a Strategy for Land Settlement and Sustainable Development' in Jean Besson and Janet Momsen (eds.), *Caribbean Land and Development Revisited* (New York: Palgrave Macmillan, 2007), 136.
[28] Ibid.

> the Caribbean region, for example, in Jamaica, Trinidad, and the Eastern Caribbean...[29]

Beckford and Witter argue that in Jamaica, the peasantry was "born struggling for land,"[30] with most small farmers in Jamaica still being inhibited by the after effects of land distribution as a result of colonialism. Weiss elaborates by stating:

> Nearly 170 years after Emancipation, landed inequities remain staggering, with roughly 4 percent of landholders controlling 65 percent of all the agricultural land in estates and pastures which form the fertile alluvial plains. The remaining 96 percent of landholders (including the 7 percent classed as landless) control only 35 percent of the agricultural land in small, hillside farms that average 0.83 hectares. These inequities are magnified by the widespread insecurity of tenure, differential land quality, and unequal access to irrigation and infrastructure.[31]

It can be ascertained therefore that colonialism and its legacy has had an impact on how land is treated, in terms of an evolution from its customary value, to that of an economic commodity. Despite of this evolution, there are still instances across the Commonwealth Caribbean where the consideration of land's customary value has been maintained. The issue which arises in this regard is how policy-makers treat with the occupation of land which falls outside the ambit of formal registration systems.

2. "Formalizing" Informal Title

Under the current dominant legal system, access by landless persons to formal title rests largely on their ability to make a claim through the doctrine of adverse possession. As Kodilyne observes, "the concept of adverse possession is rooted in the

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[29] Ibid.
[30] George Beckford and Michael Witter, *Small Garden...Bitter Weed: The Political Economy of Struggle and Change in Jamaica* (Mona: Institute for Social and Economic Research, 1991), 41.
[31] Tony Weiss, '(Re-)Making the Case for Land Reform in Jamaica', *Social and Economic Studies*, 53 (2004), 35-72, (p. 38).

theory that the basis of title to land in English law is possession."[32] By this doctrine, an individual who is in possession of land as a squatter can obtain formal title if the true owner of the land "fails to assert his superior title within the requisite limitation period in the particular jurisdiction."[33] In the Jamaican Court of Appeal case of *Farrington v Bush*,[34] Graham-Perkins JA confirms that the squatter has to solely have the intention of unequivocally excluding the original owner from the land. According to Perkins JA:

> To support a finding of adverse possession, there must be positive and affirmative evidence of acts of possession, unequivocal by their very nature and which are demonstrably consistent with an attempt, and an intention, to exclude the possession of the true owner....an equivocal act means an act of such a nature as to provide an equal balance between an intention to exclude a true owner from possession and an intention merely to derive some enjoyment or benefit from the land wholly consistent with such use as the true owner might wish to make of it. [35]

Likewise, the Trinidad and Tobago High Court in *Dolly v Sookoo*[36] followed the judgment in *Farrington* and confirmed that title through adverse possession could only be obtained where it was proven that the squatter was in occupation of the land, and that they had the intention to possess, by dispossessing the legal owner of the land.

Quite absent from the region are active Non-Governmental Organizations (NGOs) advocating access to land for the landless outside the scope of the existing normative rules. Instead, the advocacy of a rights based approach to the treatment of land has been left up to those Parliamentary representatives or private citizens who have taken this cause upon themselves. Former Trinidadian Member of Parliament, John Humphrey for

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[32] Kodilinye, *Commonwealth Caribbean Property Law* (see n. 7, p. 111), 243.
[33] Examples of limitation periods include Barbados: 10 years (Limitation of Actions Act 1997 s 25); Jamaica: 12 years (Limitation of Actions Act s 3); Dominica: 12 years (Real Property Limitation Act Cap 54:07 s 2); Guyana: 30 years (Title to Land (Prescription and Limitation) Act, Cap 60:02 s 3); Grenada: 12 years (Limitation Act, Cap 173 s 4); Trinidad and Tobago: 16 years (Real Property Limitation Ordinance, Ch 5 No 7 s 3).
[34] *Farrington v Bush* (1974) 12 JLR 1492.
[35] Ibid, 1493.
[36] *Dolly v Sookoo* [07.07.2006] H.C.1587/1997, Carilaw TT 2006 HC 53.

instance has argued that the right to shelter of the citizens of Trinidad and Tobago was a common law right.[37] Humphrey has claimed that because the crown acquiesced to former slaves settling on state land following emancipation, in order to sustain them from the land, this created a common law right to shelter, and to the land.[38] According to Humphrey: "The Crown had its marines, it had its constabulary, and could easily have gone and removed them, but the Crown accepted them in those conditions. That established in the common law a certain right."[39] A major area of concern from a human rights perspective is the forced demolition of the dwellings structures of those persons occupying state-owned lands. Humphrey has blamed the demolition of squatting settlements by the state as an exercise in exhorting power and authority, instead of understanding the issues facing landless persons, stating in Parliament:

> Mr. Speaker, I have been arguing for a very, very, long time, that the squatters who squat on state land, who cannot do no better for themselves and their families are, in fact, not in breach of the laws of Trinidad and Tobago. There is a law governing state lands in the statute books, the State Lands Act, which lays out the procedure by which, if there is a squatter on state land, the state can remove that squatter. That procedure required that a complaint be laid before a magistrate and only the judiciary has the power to instruct the removal, the forceful removal, and the demolition. But they (the government) do not recognize that. You see, they were the Government, and were big and powerful, and they were going to use this big power that they had to do just as they pleased.[40]

Overall, the general approach of hard law towards securing property rights to land is the establishment of a private ownership system through the conveying of title. This system largely excludes informal customary practices such as communal tenure

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[37] Trinidad and Tobago State Land (Regularisation of Tenure) Bill House of Representatives Debate 6 March 1998, 70.
[38] Ibid.
[39] Ibid.
[40] Ibid, 71.

arrangements. In the Commonwealth Caribbean, these informal arrangements are largely evidenced by the prevalence of squatting communities and family land.

The Sou-Sou Land Initiative in Trinidad and Tobago

The *Sou-Sou* Land initiative which began in Trinidad and Tobago in 1983 provides an example of the landless collectively mobilizing their resources to acquire land and build communities.[41] The ideology behind the *Sou-Sou* Land initiative was derived from an informal, traditional practice observed in communities throughout the island, whereby participants would combine their financial resources in order to achieve a particular purpose. The term *'sou-sou'* was derived from the French patois expression, meaning 'coin by coin.'[42] The process is described by Griffith-Charles:

> Participants put small sums of money periodically into a communal fund managed by one of the group, and each person in turn would 'draw a hand' or receive all the contents of the communal fund, available for a major deferred purchase. The practice may have been introduced from West Africa through the slave trade and is used at all levels of society. Its advantages are small group sanctions over default, simple administration and a flexible participatory scheme. No interest is charged, and a round usually covers the year.[43]

The *Sou-Sou* Land movement organized themselves to form the *Sou-Sou* Land Company as a private initiative to acquire land for the landless.[44] Fuelling this movement was the decision by a landowner, which was a large land development company, to demolish the homes of seventeen (17) families who had been squatting on the land.[45] With the assistance of Humphrey, an effort was made to relocate the squatters to another

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[41] Charisse Griffith-Charles, 'We Are Not Squatters, We Are Settlers' in Robert Home and Hilary Lim (eds.), *Demystifying the Mystery of Capital: Land Tenure & Poverty in Africa and the Caribbean* (London: Routledge-Cavendish, 2013), 109.
[42] Ibid, 108.
[43] Ibid.
[44] Lennox Sankersingh, 'An Experiment in Land Reform' *Trinidad and Tobago Guardian* (Port-of-Spain, 23 April 2009).
[45] Ibid.

existing squatting settlement.[46] However, the existing squatting community protested as they believed the increased influx of squatters from the demolished settlement would bring attention to their area from the public authorities.[47] Interestingly at the time, as a result of an oil boom during the period 1973 to 1984, there was the problem of large agricultural estates being unable to attract labour, resulting in operations having to cease within these estates. Consequently, the owners of the estates could not continue to maintain the land and pay taxes, and attempted to sell the land at reduced prices. The landless families were encouraged by Humphrey to combine their financial resources to purchase a small estate, as well as to invite other landless families to take part in this initiative. During the process it was realized that the contributions were in excess of what was required to purchase the land, and families had to be asked for portions of their contributions to be returned to them. Within five years, the *Sou-Sou* Land Company was able to purchase thirteen (13) estates.[48] These estates were thoroughly surveyed so that each participant would know the specific boundaries of the land which was allocated, and the land was also partitioned to address both housing and agricultural needs of the community.[49]

In 1987 the Sou-Sou Land initiative was identified by the United Nations Centre for Human Settlements (Habitat) as being one of ten innovative projects for the International Year of Shelter for the Homeless, a mere four years after the project had been initiated.[50] The establishment of the *Sou-Sou* Land Company was recognised by Habitat as being a successful experiment through private initiative of distribution of home sites to the homeless, and was hailed as an attempt by a former colonial people to discover

[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] Centre for Human Settlements (Habitat), The Director's Report for International Year of Shelter for the Homeless (Nairobi: UNHCS, 1987).

a novel method of providing land for the landless by drawing on the wisdom of indigenous approaches to self-reliance, and the ability to economise in a situation of limited resources.[51] The initiative also received endorsement from the Caribbean Community (CARICOM), where it was considered to be a major project cognisant of the Caribbean experience and relevant to the region's shelter problems.[52]

Despite of international recognition, the controversial issue which exists to date with these *Sou-Sou* Land settlements is that the communities remain dependant on government action to recognise, and regularise their tenure. Griffith-Charles highlights the plight and desperation of a resident who was interviewed and commented in local dialect:

> We purchase the land already. Is just that we don't have the final deed. They will have to kill me if is anything. I build the house, but the most important thing is to get the deed. When you get the deed you more secure.[53]

Nonetheless, the *Sou-Sou* Land arrangement also demonstrated that individuals now felt a greater sense of belonging and national pride. According to the president of a community group as interviewed by Griffith-Charles:

> I feel secure because I am a citizen of Trinidad and Tobago. Where I was squatting before I was asked to locate somewhere else and I did so at that time. I feel more secure as the time goes by because my motivation goes a lot of way in this country....as citizens of Trinidad and Tobago we have rights. We are not squatters; we are settlers. And this is something they have to change in the Act; don't call us squatters.[54]

The main problem with the *Sou-Sou* Land arrangement was the lands not being approved by the state for residential use, as the lands acquired were primarily encumbered estates which were remnants of the former colonial period, and were located near to

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[51] Ibid.
[52] Government of Trinidad and Tobago, *Report of the Meeting of CARICOM Ministers of Housing and Settlements* (Port-of-Spain: Ministry of Housing and Settlements, 1988).
[53] Griffith-Charles (see n. 41, p. 119), 110.
[54] Ibid, 111.

existing estate villages. The *Sou-Sou* Land Company was above all motivated by its concern with a lack of affordable housing, and as a result acted in contravention of state planning regulations.

Jamaica's Operation PRIDE

Like Trinidad and Tobago, Jamaica has had a long history of squatting which dates to the post-emancipation period. In the aftermath of the 1834 abolition of slavery, the newly emancipated community began settling on vacant lands belonging to the Crown as well as abandoned land arising from encumbered estates.[55] This land was used for the construction of housing and for subsistence agriculture. The Jamaican government in 1994 made an effort to establish a state settlement policy based on a philosophy similar to that of *Sou-Sou* land through its Programme for Resettlement and Integrated Development Enterprises (also known as Operation PRIDE). Here, the government attempted to explore outside the ambit of the already established rigid tenure system by establishing its policy objective of making "land accessible to a wide cross-section of persons using innovative techniques to ensure success."[56] In essence, it was meant to empower Jamaican squatters. Schoburgh and Gatchair have outlined the policy objectives behind Operation PRIDE, stating:

> Operation PRIDE was intended to: (a) reverse the socio-economic fall-out that many persons in low socio-economic groups had experienced as a result of the economic restructuring of the period; (b) set in motion a framework that would support the formulation of an appropriate settlement policy; and (c) curb indiscriminate capture of government and privately owned land.[57]

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[55] Jimmy Tindigarukayo, 'An Attempt to Empower Jamaican Squatters', *Environment and Urbanization*, 16 (2004), 199-210, (p. 199).
[56] Asad Mohammed, 'Problems in Translating NGO success into government settlement policy: Illustrations from Trinidad and Tobago and Jamaica', *Environment and Urbanization*, 9:2 (1997), 233-246, (p. 245).
[57] Eris D. Schoburgh and John Martin, 'From Developmental Local Government to Developmental Local Governance' in Eris D. Schoburgh, John Martin and Sonia Gatchair (eds.), *Developmental Local*

Operation PRIDE was essentially formulated to be a joint effort amongst various stakeholders which would include the state, private sector, professional bodies, Non-Governmental Organizations and Community-Based Organizations. Like the *Sou-Sou* Land scheme, PRIDE focused on pooling community finances and resources and using a *'self-help'* method for infrastructural development so that essentially as community resources increased, the community infrastructure would also be improved. Operation PRIDE therefore intended to revolve around mobilizing those persons not forming part of the formal land market and then using their capabilities to develop sustainable communities. Operation PRIDE essentially represented a focused response to the issue of squatting but according to Schoburgh and Gatchair, "it was a victim of a political culture that values the spoils system rather than sound policy design and implementation."[58]

As Mohammed argues, Operation PRIDE was transformed into something of a political movement rather than one advocating a right to land for landless persons.[59] Whereas it was recommended that a pilot phase of the project be initially established with a minimum of six settlements, the Jamaican government attempted to initiate 200 settlements within the first year.[60] This had an adverse effect on the outlook of the project as it was initially conceptualized as one which intended to promote organic growth based on the level of community and financial mobilization.[61] As a result, Operation PRIDE became faced with cash flow problems. Not adhering to its initial policy objectives, the Operation PRIDE office began hiring consultants to aid with the production of technical planning reports which then informed construction work by contractors.[62] This resulted

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Governance - A Critical Discourse in 'Alternative Development' (London: Palgrave McMillan, 2015), 207.

[58] Ibid, 208.

[59] Mohammed, *Problems in Translating NGO success* (see n. 56, p. 122), 245.

[60] Ibid.

[61] Ibid.

[62] Ibid.

in early indications of low community participation and a minimal co-relation between actual expenditure on the settlements and the income capabilities of the community.[63]

Even in the aftermath of the failed Operation PRIDE, there remains an alarming absence of data to effectively inform policy and decision making. A 2007 Jamaican Government Report based on a stock-taking study during 2007/2008 advised that there was "little concrete information about the extent or nature of squatting in Jamaica" and also that "without knowledge of the magnitude of the phenomenon, its growth and the potential for upgrading the settlements, it would not be possible to develop a policy to manage the existing settlements in a sustainable manner."[64] It was estimated that Operation PRIDE cost the Jamaican Treasury more than Seven Billion Jamaican Dollars.[65] Other social problems have also been blamed for the failure of several Operation PRIDE settlements. In St. James for instance, residents abandoned their houses as a result of them being vandalized, and because of a high murder rate in the area.[66]

3. Property Rights and their Constitutional Protection

Although not explicitly addressing the notion of land rights where occupation of the land falls outside formal legal recognition, all Commonwealth Caribbean constitutions guarantee the right to protection from deprivation of property.[67] Interpretation by domestic courts of what this particular constitutional right means has produced broad guidelines defined by legal, and in some instances human rights approaches. Various judicial decisions, which have considered constitutional provisions

[63] Ibid.
[64] Government of Jamaica, Rapid Assessment of Squatting Report (2007), 19.
[65] 'Operation Pride lost more than $7 billion', *Jamaica Observer* (Kingston, 5 April 2011).
[66] 'Residents abandon Operation Pride housing scheme in St. James' *RJR News* (Kingston, 31 July 2009).
[67] Antigua (s 9); Bahamas (art 27), Barbados (s 16), Belize (s 17), Dominica (s 6), Grenada (s 6), Guyana (art 142), Jamaica (s 18), St. Kitts (s 8), St. Lucia (s 6), St Vincent (s 6) and Trinidad and Tobago (s 4(a)).

guaranteeing the right to property, provide some insight on how land rights might fall within the securing property rights from a constitutional perspective.

One of the important issues emerging from the cases relates to compensation for the compulsory acquisition of land by the state. For example, the Court of Appeal of Grenada in *Grand Anse Estates Ltd. v Governor General of Grenada and Others*[68] considered whether the compulsory acquisition was in fact null and void in accordance with Section 6(1) of the Constitution of Grenada which reads:

> No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where provision is made by a law applicable to that taking possession or acquisition for the prompt payment of full compensation. [69]

In this case, the appellant contended that this constitutional provision was not adequately satisfied during the process of compulsory acquisition which took place by virtue of the Land Acquisition Ordinance[70]. The appellant argued that for section 6(1) to be satisfied, there were three pre-conditions necessary for the action to qualify as a constitutional acquisition and that the absence of any would make the acquisition unconstitutional. These pre-conditions were that (1) there had to be a law applicable at time of acquisition in existence; (2) a provision for prompt payment in the law; and (3) that the compensation payment had to be in its entirety.[71] Within this context the appellant argued that "full compensation" meant that the value of the land had to be ascertained at a rate determined at the time of the acquisition, and not at a rate which reflected the value of the land at a date twelve months prior to the acquisition, as was the situation in this particular instance. In interpreting what was meant by "full compensation," the Court of

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[68] *Grand Anse Estate Limited v. Governor-General of Grenada* [7 October 1977] West Indies Association States CA CivAppNo.1976/ 3.
[69] Grenada Constitution Order 1973.
[70] Cap 153 of the Laws of Grenada (1958).
[71] Sir Fred Phillips, *Commonwealth Caribbean Constitutional Law* (London: Cavendish, 2002), 70.

Appeal held that it must mean a just equivalent of the land at the time of acquisition, plus any loss incurred by such acquisition plus adequate interest to the date of payment.[72] Providing further clarity to the interpretation of the constitutional provision for "full compensation" the Court of Appeal elaborated that there could be cases in which the value of the land twelve months before the acquisition would amount to adequate compensation, but there may also be instances where within twelve months the value of the land in certain areas may increase to a large extent.[73] The Court of Appeal went on to hold that a provision in Section 19 of the Land Acquisition Ordinance which placed a limitation on the value of the land acquired to a value twelve months prior to the date of the acquisition was in fact an infringement of a fundamental right to full compensation as enshrined in Section 6(1) of the Constitution, and therefore that particular provision of the ordinance was *ultra vires.*[74] What this decision indicates is that while the legislature is given the discretionary power of establishing principles which govern how compensation is to be determined, those principles should also ensure that the compensation is just and adequate. According to Allen, the importance of this is that "the courts are unwilling to allow the legislature or executive any discretion in making the assumptions necessary for determining the market value of property."[75]

The issue of constitutional protection for property rights in the context of housing demolition was considered in the Trinidad and Tobago case of *Krakash Singh v Attorney-General of Trinidad and Tobago*.[76] Here, the applicant filed a constitutional motion seeking a declaration that his constitutional right to enjoyment of his property and the right not to be deprived thereof except by due process of law was infringed by agents of

[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] Tom Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge: Cambridge University Press, 2009), 321.
[76] *Krakash Singh v Attorney-General of Trinidad and Tobago* TT [20 May 1983] HC 2443/1982.

the state who destroyed his house which was situated on lands tenanted to him. The applicant also contended that the demolition of his house contravened his right to respect for his private and family life, as well as his right to equality before the law.[77] He further argued that State Lands Act[78] and the Land Acquisition Act[79] gave an expectation to the citizen of civil behaviour on the part of the state, and that this was also settled practice.[80] The state however contended that there ought not to be any recourse to constitutional remedy since the land under consideration belonged to the state, and that the state was therefore exercising its ordinary rights as owner.[81] The state further argued that the applicant failed to show that he had a right to possession of the land, as the person who he claimed to be his landlord no longer had a right to possession of the land.[82] The High Court held that the applicant did indeed have the right to protection of the property, of which he could not be deprived other than by due process of the law, as outlined under Section 4(a) of the Constitution.[83] The court further opinioned that the state also neglected to follow "settled practice" provided for by the legislation for the removal of squatters as contended by the applicant.[84] Interestingly, the "settled practice" of the state being required to display civil behaviour when removing the squatter from state lands was deemed to have existed before the constitution came into effect, but upon its establishment, it would now be able to attach itself to the related constitutional right.[85] Another important element of this judgment is that it recognised the enjoyment of property as a fundamental right which was more extensive than rights contained in other constitutions, such as the right to acquire, hold and dispose of property as espoused for

[77] Ibid, 1.
[78] Revised Laws of the Republic of Trinidad and Tobago Ch 57:01.
[79] Ibid, Ch 58:01.
[80] *Krakash Singh* (see n. 76, p. 126), 6.
[81] Ibid, 7.
[82] Ibid
[83] Ibid, 10.
[84] Ibid, 14.
[85] Ibid.

example in the Constitution of India.[86] It deemed the enjoyment of property not to be limited to rights of property in the strict legal sense, but to be construed with the widest possible meaning which was consistent with a free people in a free state and which ought to remain unaffected by exhaustive definitions which have sought to circumscribe it.[87]

In *San Jose Farmers' Co-operative Society Ltd v Attorney-General of Belize*[88], the Belize Court of Appeal held that the Constitutional right of access to the courts to establish the right or interest of a claimant in property which was being compulsorily acquired by the state should have been expressly included in the Land Acquisition (Public Purposes Act)[89] since "questions of rights to land are matters which are properly justicable by the Supreme Court."[90] Section 17(1)(b) of the Belize Constitution[91] provides that any law authorizing the compulsory acquisition of property or an interest or right over property must secure to any person who claims an interest in or right over the property, a right to access to the courts to establish their rights to the property. In light of this provision, the Court of Appeal rejected submissions on behalf of the Attorney General that there was no conflict between the Constitution and the Land Acquisition (Public Purposes Act)[92], which excluded provisions for access to the courts in the case of a compulsory acquisition, and that the law was merely silent on the matter.[93] The Court went on to state that if it was the intention of the Constitution makers for the provision for access to the courts to be contained merely in the Constitution itself, this would have been indicated in the Constitution.[94] According to Sir James Smith JA:

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[86] Kelvin Ramkissoon, An Analysis of the Legal Framework for State Land Management in Trinidad and Tobago (Wisconsin: University of Wisconsin, 2000), 18.
[87] Ibid.
[88] *San Jose Farmers' Co-operative Society Ltd v Attorney-General of Belize* (1991) 43 WIR 63.
[89] Land Acquisition (Public Purposes) Act, Cap. 150 of the Laws of Belize.
[90] Ibid, 85.
[91] Constitution of Belize Cap. 4 s17(1)(b).
[92] Land Acquisition (Public Purposes) Act, Cap. 150 of the Laws of Belize.
[93] *San Jose Farmers' Co-operative Society Ltd* (see n. 88, p. 128), 84.
[94] Ibid.

> The only right of access to a court is found in section 24 of that Act, which provides that an appeal lies to the Court of Appeal against the determination of the Board for the Compulsory Acquisition of Land of any question of disputed compensation. This section also declares that the determination of that board is deemed to be a final judgment or order of the Supreme Court. However, the Court of Appeal has held that the board is not a court of law but an administrative tribunal. Therefore there should be access to the Supreme Court.[95]

In this judgment we have the Belize Court of Appeal confirming that the Supreme Court's jurisdiction goes beyond disputes over compensation for compulsory acquisition, but also extends to questions of rights to land, in the context of constitutional protection of property rights. The recognition by the Belize Court of Appeal of the existence of land rights in instances of compulsory acquisition is noteworthy, particularly considering that this area had not even been contemplated within the legislation.

4. Addressing Customary Land Use

This section will consider the importance of customary land use being given legal recognition, despite the customary possession of land falling outside the formal land titling system. It will also suggest that a hybrid model be developed which will allow the peaceful co-existence of both formal and informal land tenure arrangements. According to de Satgé and Kleinbooi, arable and resource rich land held under customary tenure systems have "acquired new value as a commodity and is increasingly being regarded as a strategic resource and potential source of wealth waiting to be 'unlocked' by external investors."[96] As a result, tenure and land rights security of the poor who fall outside of the formal land registration system "is becoming increasingly

[95]Ibid, 89.
[96] Rick de Satgé, Karin Kleinbooi and Christopher Tanner, *Decentralised Land Governance: Case Studies and Local Voices from Botswana, Madagascar and Mozambique* (Cape Town: University of the Western Cape, 2011), 4.

precarious and subject to powerful forces within an increasingly globalised economy."[97] Furthermore, changes "in global resource equations have contributed to a spike of interest in arable land and natural and mineral resources by foreign corporations and governments."[98] This narrative is not alien to the Commonwealth Caribbean. In *Bowen v. Attorney General of Belize*[99] for example, the Government of Belize sought to pursue a constitutional amendment bill aimed at altering the constitution to allow state exploitation of an oil discovery by removing natural resources such as petroleum and associated minerals from the constitutional protection of property rights. The Supreme Court of Belize however struck down the amendments, holding that the lawmaking powers of Parliament are limited in the sense that it cannot enact laws which are contrary to the 'basic structure' of the Constitution.[100] As such, denying access to the courts in order to prevent the challenge of alleged breaches of the right to property meant that the amendment violated the rule of law, the protection of the right to property and the separation of powers, thereby disrupting the basic structure of the Constitution.[101] As will be discussed, there have been other scenarios which strongly suggest that there exists a need for the protection of customary land from both state and corporate actors through legal recognition.

In *Cal and others v Attorney General of Belize and another & Coy and others v Attorney General of Belize and another*[102] the Belize Supreme Court considered whether Maya customary land tenure constituted "property" for the purposes of the Constitution of Belize. The claimants who were members of Mayan communities brought proceedings against the state seeking redress for alleged violations of their constitutional rights which

[97] Ibid.
[98] Ibid.
[99] *Bowen v Attorney General of Belize*, BZ 2009 SC 2.
[100] Ibid, [12].
[101] Ibid, [5].
[102] *Cal and others v Attorney General of Belize and another & Coy and others v Attorney General of Belize and another* (2007) 71 WIR 110.

they contended arose from the failure by the government to recognise, protect and respect their customary land rights based on their traditional land use and occupation.[103] The claimants also asserted that the proprietary nature of these rights was affirmed by Maya customary law, international human rights law and common law.[104] The court confirmed that traditional and cultural interests in land was able to translate into a property right, which would thus be subject to protection by the Constitution of Belize. According to Conteh CJ:

> I therefore conclude that the claimants' rights and interests in lands based on Maya customary land tenure are not outwith the protection afforded by the Belize Constitution, but rather, constitute 'property' within the meaning and protection afforded to property generally, especial here of the real type, touching and concerning land - 'communitarian property', perhaps, but property none the less, protected by the Constitution's prescriptions regarding this institution in its protective catalogue of fundamental human rights. Moreover[…….]that a generous and purposive interpretation is to be given to constitutional provisions protecting humans and that a court is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a mature society, I have no doubt that the claimants' rights to and interests in their lands in accordance with Maya customary land tenure, form a kind or species of property that is deserving of the protection the Belize Constitution accords to property in general. There is no doubt this form of property, from the evidence, nurtures and sustains the claimants and their very way of life and existence.[105]

It was also established by the court that the acquisition or change of sovereignty was not able to extinguish pre-existing title to, or interests in the land.[106] The defence had argued that any claim to the land the claimants might have had was extinguished as a

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[103] Ibid.
[104] Ibid.
[105] Ibid, 146.
[106] Ibid, 139.

result of British sovereignty over the territory.[107] During the colonial administration of Belize, grants of land and leases were made under the Crown Lands Ordinance, and this practice continued under the subsequent National Land Act of 1992[108], following the independence of Belize.[109] However, According to the Court:

> In particular, I do not think it is logical, reasonable or fair to hold that the 1859 Treaty with Guatemala, by extending the southern borders of British Honduras (today's Belize) to the Sarstoon River, necessarily extinguished the pre-existing rights of or interests of the Maya inhabitants of the area in their lands. The Crown by a combination of the various treaties with Spain and later with Guatemala, first acquired interests in British Honduras and by effective occupation and administration together with the passage of time, gained sovereignty over the territory which it legally passed on to independent Belize on 21 September 1981. This sovereignty did not without more however, affect or alter or extinguish the pre-existing rights of the Maya people to their lands.[110]

The Belize Supreme Court in *Cal and others*[111] also recognized the important implications of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[112] to the Indigenous Peoples in Belize by applying its principles in deciding on Mayan customary land rights. Article 26 of the UNDRIP states that Indigenous Peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. According the Belize Supreme Court:

> Also, importantly in this regard is the recent Declaration on the Rights of Indigenous Peoples adopted by the General Assembly of the United Nations on 13 September 2007. Of course, unlike resolutions of the Security Council, General Assembly resolutions are not ordinarily binding on member states. But where these resolutions or declarations contain principles of general international law, states are not expected to disregard them. This declaration--GA Res 61/295--was adopted by an overwhelming number of 143 states in favour with only four states against with 11

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[107] Ibid 138.
[108] National Land Act of 1992, CAP 191 of 2000.
[109] *Cal and others* (n102), 137.
[110] Ibid, 139.
[111] *Cal and others* (see n. 102, p. 130) .
[112] United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly (2 October 2007) GA/RES/61/295

> abstentions. It is of some signal importance, in my view, that Belize voted in favour of this declaration. And I find its art 26 of especial resonance and relevance in the context of this case, reflecting, as I think it does, the growing consensus and the general principles of international law on indigenous peoples and their lands and resources.[113]

Also instructive from this case is the court's assertion that the extinguishment of rights to, or interests in land should not be lightly inferred.[114] In this regard, according to the court, there must be clear and plain legislative intent and action to give effect to such extinguishment.[115] What is interesting about this point is that it suggests that the extinguishment of cultural rights in land cannot be inferred by virtue of legislation which provides for formal registration of the land. The court also went further, warning of the seriousness of consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land by the Legislature or Executive.[116]

In 2004, the Inter American Court of Human Rights (IACHR) published its Report in the *Maya Communities* case[117] which confirmed that Maya customary property interests were 'property' within the meaning of the American Declaration and also found that the Maya peoples' rights to property, non-discrimination and judicial protection had been violated by the state of Belize. The Report concluded that Belize had failed to take effective measures to recognize, demarcate and title Maya communal property and failed to hold effective consultations and obtain the informed consent of the Mayans before granting logging and oil concessions to third parties.[118] These actions of the Belize government were found to be in violation of the right to property enshrined in Article

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[113] *Cal and others* (see n. 102, p. 130) , 153.
[114] Ibid, 142.
[115] Ibid.
[116] Ibid 143.
[117] *Maya Indigenous Community of the Toledo District v Belize* Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004) .
[118] Ibid, 193 – 194.

XXIII of the American Declaration.[119] This matter was also heard before the Caribbean Court of Justice (CCJ) in 2015 under the title *The Maya Leaders Alliance et. al. v the Attorney General of Belize*.[120] The CCJ ruled that Belize breached the Appellants' right to protection of the law in its failure to ensure that the existing property administration system which was inherited from the pre-independence colonial system, recognised and protected Maya land rights.[121] Importantly, the CCJ further emphasised that the protection of the law is linked to fairness and the rule of law and that it was necessary for Belize to take positive steps to secure and protect constitutional rights[122] in addition to honouring its international commitments, such as its obligations to protect the rights of indigenous peoples.[123]

Claims to land as an Usufructuary Right

Usufructuary Rights confer upon the occupants of the land the right to use *(usus)* the land and enjoy the 'fruits' *(fructus)* of the land.[124] These rights include "the right to occupy the land, farm, hunt and fish thereon, and to take for their own use and benefit the fruits and resources thereof."[125] In the Privy Council matter of *Amodu Tijani*[126], Viscount Haldane acknowledged that there was a divide between how land is conceptualized by English jurisprudence as opposed to its treatment by various forms of native jurisprudence within the British colonies.[127] He further explained that it would be wrong to try to understand customary title in terms only suitable to English law.[128] This lack of symmetry however according to the learned judge did not mean that English law erased beneficial

[119] Ibid, 5.
[120] The Maya Leaders Alliance et. al. v the Attorney General of Belize [2015] CCJ 15 (AJ).
[121] Ibid, 59.
[122] Ibid, 48.
[123] Ibid, 52.
[124] Jérémie Gilbert, *Nomadic Peoples and Human Rights* (Oxon: Routledge, 2014), 112.
[125] Ibid, 136.
[126] Amodu Tijani v Secretary, Southern Nigeria [1921] 2 AC 399.
[127] Ibid, 402-404.
[128] Ibid.

customary rights attached to the land, despite the Sovereign claiming interest in the land as its legal estate. Accordingly, the Privy Council observed:

> Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence ... In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of trans-mitting the individual enjoyment as members by assignment *inter vivos* or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.[129]

There have been some echoes to this approach in contemporary jurisprudence of several courts across the globe. For example, the Malaysian Court of Appeal in *Kerajaan Negeri Selangor v Sagong bin Tasi*[130] accepted the views of the Privy Council in *Amodu*

[129] Ibid.
[130] Kerajaan Negeri Selangor v Sagong bin Tasi (2005) MLJ 289.

Tijani[131] as being the definitive position at common law on the issue of customary claims to land in light of claims by the state. According to Gopal Sri Ram JCA:

> ... the fact that the radical title to land is vested in the Sovereign or the State (as in this case) is not an *ipse dixit* answer to a claim of customary title. There can be cases where the radical title is burdened by native or customary title. The precise nature of such a customary title depends on the practices and usages of each individual community ... What the individual practices and usages in regard to the acquisition of customary title is a matter of evidence as to the history of each particular community ... it is a question of fact to be decided ... by the primary trier of fact based on his or her belief of where on the totality of the evidence, the truth of the claim made lies.[132]

The principles adopted in *Amodu Tijani*[133] and *Kerajaan Negeri Selangor v Sagong bin Tasi*[134] were applied in the case of *Cal and others*[135], where Conteh CJ acknowledged that Mayans of the Toledo District possessed rights of an usufructuary nature arising from evidence of their customary land tenure and communal rights to the lands. What these cases seem to suggest is that the establishment and recognition of usufructuary rights by formal law could well assist in providing a harmonious solution to any incongruities which may arise from the interplay between hard law and customary norms. There is thus ample judicial evidence to suggest that there may be situations from which land can be claimed as usufructuary rights where customary use of the land has given rise to the manifestation of a communal title.

Family Land and Land Occupied by the Descendants of Self-Liberated Slaves

Family land is considered something of a Commonwealth Caribbean cultural tradition representing a customary resistance to the existing land tenure system which was

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[131] Amodu Tijani v Secretary, Southern Nigeria [1921] 2 AC 399.
[132] Ibid, [12].
[133] *Amodu Tijani* (n126).
[134] *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005] MLJ 289.
[135] *Cal and others* (see n. 102, p. 130).

borne as a remnant of an oppressive colonial land regime.[136] According to Besson, family land "is a dynamic Afro-Caribbean cultural creation by the peasantries themselves in response and resistance to the plantation system"[137] and "both in origin and persistence the institution may be seen as a strategy for maximizing freehold rights in the face of plantation engendered land scarcity."[138] It also "symbolizes the identity of family lines, the significance of which can only be fully understood in the context of the history of former, kinless, slaves."[139]

Essentially within the family land arrangement, the family members hold a collective right to a single parcel of land for their common use and enjoyment.[140] The chain of succession is outside the scope of formal law, with the land being 'passed on' from generation to generation when the older family members become deceased. Therefore, there is no evidence of legal conveyance, administration of estate or testacy attached to the land. Family land is a common occurrence in the Commonwealth Caribbean and its existence illustrates how a traditional arrangement operates parallel to hard law. In St. Lucia, family land is estimated at 45 percent of all land holdings, including the majority of agricultural holdings.[141] In Grenada, 15 percent of the land is classed as family land and 11 percent in Dominica.[142] In St. Vincent and the Grenadines, the percentages for family land are unknown as it is classed as land which is held in 'owner-like' possession.[143] This expression describes those lands which are occupied by

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[136] Peter Bloch, 'Economic Impact of Land Policy in the English speaking Caribbean' in Allan Williams (ed), *Proceedings of the conference on Land in the Caribbean: Policy, Administration and Management in the English-speaking Caribbean* (Madison USA: Land Tenure Center, University of Wisconsin-Madison, 2003), 17.
[137] Jean Besson, 'Family land as a model for Martha Brae's new history: Culture building in an Afro-Caribbean Village' in Charles V. Carnegie (ed), *Afro Caribbean villages in historical perspective* (Kingston: African Caribbean Institute of Jamaica, 1987), 105.
[138] Ibid.
[139] Ibid.
[140] Christine Toppin-Allahar, Land Law and Agricultural Production in the Eastern Caribbean: A Regional Overview of Issues and Options (Rome: FAO, 2013), 5.
[141] Ibid.
[142] Ibid.
[143] Ibid.

individuals with a beneficial interest in the land, which has not been transformed into a legal interest due to the absence of legal title by the occupants. St. Lucia may well provide a model for other Commonwealth Caribbean territories as to how legislators should treat with family land. The high percentage of family land holdings in this territory may partly be explained by virtue of inheritance laws being based on its French inherited Napoleonic Code, whose custom provides for the entitlement of family members to shares in inherited land.[144] Under formal law, the current owners would be regarded as holding the land in indivision, that is, the land is essentially co-owned in an arrangement resembling a common law tenancy in common. By this recognition, the owners either acting collectively or individually would be granted extensive property rights. This would include the right of collective owners to sell the land, or the right of an individual family member to sell his individual share, to end the co-ownership by partition or to choose his heir by will.[145] The contradiction of this arrangement with informal law however was evident in the lack of response by those persons residing on family land to reforms providing for the granting of title to one or more family members as trustees who would have the ability to sell or mortgage the property on behalf of the entire family.[146]

A landmark decision by the IACHR was delivered in the case of *Saramaka People v Suriname*[147] which considered the occupation of land without formal title by the Saramaka people who were actually a product of the colonial experience of Suriname. The Saramaka people are descendants of self-liberated African slaves, much alike the Maroons of Jamaica, who had been living on their traditional territory since the early 1700's.[148] Their relationship with the land which they use for fishing, hunting and

[144] Ibid.
[145] Jane Matthews Glenn, 'Mixed Jurisdictions in the Commonwealth Caribbean: Mixing, Unmixing, Remixing', *Electronic Journal of Comparative Law*, 12.1 (2008), 1-23, (p. 21).
[146] Ibid.
[147] *Saramaka People v. Suriname.* 'Preliminary Objections, Merits, Reparations and Costs' [28 November 2007] IACHR Series C No. 172, IHRL 3046 (IACHR 2007).
[148] Ibid, [80].

woodworking is not only economic, but also spiritual and cultural.[149] In 1986, a revised Surinamese Constitution specified that all non-titled lands and natural resources belong to the state,[150] and by the 1990's Suriname issued logging and mining concessions to private companies to undertake operations within the traditional territory of the Saramaka people without their prior consultation or consent.[151] The IACHR decision in this matter was significant as for the first time, it ruled that a non-indigenous community would also be able to enjoy rights akin to those afforded by indigenous peoples and also be considered as a tribal community protected by international law if they shared similar characteristics such as spiritual connections with the land, a distinct culture, language and traditions.[152] In this regard, the Saramakas were viewed by the IACHR as being entitled to the recognition of their communal property, with the court also confirming the existence of a right to property in certain circumstances, despite the non-existence of an official title.[153] Another important point addressing land rights which arises from this decision by the IACHR is that the court confirmed a link between land and the survival of a community in the situation where the land is used for economic, social, cultural and religious purposes.[154]

Addressing customary land use through hybrid systems

As discussed, the Commonwealth Caribbean region has experienced a situation of land tenure systems being inherited from the British colonial administration co-existing with customary arrangements such as family land, squatting and forms of indigenous customary land use. Practically, it would be very difficult to entirely remove land

[149] Ibid, [82].
[150] Ibid, [119].
[151] Ibid, [142].
[152] Ibid, [96].
[153] Ibid, [102].
[154] Ibid, [85].

classification systems brought about by the legacies of colonialism and begin with a new classification system which would address how land is used by the plural Commonwealth Caribbean Society. In this regard, a hybrid arrangement whereby formal registration systems and customary and informal land arrangements would be able to co-exist may be the best arrangement in satisfying the economic, social and cultural rights of the region's inhabitants.

There are some lessons to be learnt from other regions which have witnessed the imposition of colonial rules on land rights but have maintained a more plural approach to land tenure systems. For example, in Madagascar a system exists whereby customary land holdings operate alongside the statutory Torrens system, which was imposed by its French colonists to protect their interest in the land. By virtue of the Torrens system, the individual could only obtain secured tenure through the registration of land rights via a centralized land registry. In describing the Madagascar land tenure reforms, Kleinbooi explains:

> In 2003, civil society initiated national debate about the two parallel land tenure systems (privately and traditionally held tenure). It intensified the appeal for a revised and simplified registration approach that acknowledges land rights based on local allocation practices, which ensured secure tenure on land held under customary systems. A new land policy in 2005 proposed a decentralised land management system. This aimed to promote secure access to land by creating a more efficient legal and institutional environment. The land decree (2005-019, 17 October 2005- commonly referred to as the land policy letter) was promulgated, which changed the principles of the statutes governing land in Madagascar.[155]

By way of this process, Madagascar introduced new land legislation geared towards land tenure decentralisation which provided for the recognition of localized land rights. This process was facilitated through "the creation of local land offices with

[155] de Satgé, Karin Kleinbooi and Tanner, *Decentralised Land Governance* (see n. 96, p. 129), 52.

representation of elected villagers and a municipal appointed official, who are responsible for registering non-titled private property and legitimising customary holding of land."[156] Mozambique land legislation also provides for the recognition of customary land rights and mandatory community consultations aimed at facilitating community "participation and negotiation between local people and outside interests, and providing for the devolution of important land and natural resources management functions to 'local communities."[157] Where an investor is interested in occupied land, the investor is required to initiate a process that commences with a community consultation.[158] Where the investor is met with local approval, the state provides the investor with a *Direito de Uso e Aproveitamento da Terra* (the right of use and benefit from the land).[159] If the local occupants need the land themselves or disapprove of the investor, there is no legal guarantee that the process will be met with local approval.[160]

Understanding claims to land by marginalised communities and examining their relationship with natural resource management, whether positive or negative, would be an important foundational aspect of developing a hybrid arrangement. In terms of how customary rights to natural resources are treated by the state, the view exists that present day perceptions were formed under the influence of colonial rule.[161] By such means, any attempt by the colonial authority to codify customary law resulted in "a highly fluid set of practices" being made static, and representative of a political and economic context which embodied the nature of the law during the colonial period.[162] To re-consider this position, there should be a movement towards examining the development of marginalized communities in terms of their claim to property within a framework looking

[156] Ibid.
[157] Ibid, 83.
[158] Ibid.
[159] Ibid, 86.
[160] Ibid.
[161] Amity Doolittle, 'From Village Land to "Native Reserve": Changes in Property Rights in Sabah, Malaysia, 1950-1996', *Human Ecology*, 29 (2001), 69-98, (p. 71).
[162] Ibid, 72.

at their historical development and their management of natural resources. In relation to agriculture for instance, the absence of permanent tenancy for squatters has meant that there is no incentive to practice soil conservation, and farming is largely characterized by 'slash and burn' methods on high elevated land with steep slopes. Crops are planted according to market demand instead of land stability.[163]

A pivotal area of divergence between state and non-state actors that needs to be addressed is dissimilarities in how property regimes are regarded and the way by which land is acquired. Whereas stemming from colonial administration and permeating into the practices of the present day state is the view that property regimes are to be treated as homogenous entities, in practice, marginalized communities have divergent perspectives on land security and their relationship with real property. On the other hand, since the emergence from colonialism, marginalized communities exposed to state based norms would have gone through a process of being reconfigured through prevailing socio-political and economic conditions. Based on experience in Malaysia, Dolittle further explains this concept by stating that "access to resources and the transformation of property rights is shaped by both internal village conflicts over cultural meaning, social identity, and power and also by the incorporation of rural areas into the colonial and national political economy."[164]

An exploration of notions of community and custom would need to be understood by policy makers in order to devise a rights-based land arrangement which could exist harmoniously with existing state based tenure systems. Development of a hybrid model would therefore need to look at how marginalized communities put land and natural resources to use. According to Brosius et. al., "advocates have found concepts of indigenous, community, custom, tradition and rights useful in promoting possibilities for

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[163] Frank Gumbs, *Farmers and Soil Conservation in the Caribbean* (Kingston: UWI Canoe Press, 1997), 31.
[164] Doolittle, *From Village Land to "Native Reserve"* (see n. 161, p. 141), 71.

local empowerment in national and transnational policy discussions."[165] Consensus on any arrangement between the state authority and marginalized communities should be "conceptualized as mutually constitutive and deeply intertwined"[166] as opposed to succumbing to a rhetoric of domination and resistance. Within this context, Doolittle suggests pursuing an understanding of the relationship between state and society "by looking beyond the notion of a colonial government that imposed legal structures on a pliant and unresisting subject population."[167] Instead, what is essential is looking at the role of negotiation, understanding and a general sentiment of co-operation between state actors and marginalized groups. Part of this process would be to "examine the nature of the negotiations between colonial administrators and local leaders, and explore what creative forms of state control developed and what new forms of local autonomy emerged from these state-society interactions."[168]

The emergence of hybrid legal arrangements in terms of land classification could only have a positive contribution to the development of an inclusive, syncretic environment. A legal landscape which allows this may well contribute to the enabling of a normative shift towards a more rights oriented society in the context of how land is used and otherwise regarded. Ideally a hybrid system would be able to traverse both how the formal and informal treat the land, in order to produce a rights oriented perspective on how the land ought to be regarded for whatever particular purpose based on the surrounding circumstances. The development of a rights based hybrid system may also protect the region from forms of "new-age colonialism" such as corporate land grabbing and the general exploitation of land and natural resources by commercial interests. An

[165] Peter Brosius, Anna L. Tsing and Charles Zerner, 'Representing Communities: Histories and Polities of Community-Based Natural Resource Management', *Society & Natural Resources*, 11:2 (1998), 157-168, (p. 159).
[166] Doolittle, *From Village Land to "Native Reserve"* (see n. 161, p. 141), 70.
[167] Ibid.
[168] Ibid, 71.

important process in the establishment of such a safeguard is for regional governments to be able to understand and express at a policy and legislative level the impact of customary and informal land holdings on notions of statehood and national identity.

Conclusion

Tenure security in the Commonwealth Caribbean remains largely influenced by positivist-framed legislation which largely neglect other rights based approaches. At the domestic level, state actors need to examine various ways to treat with customary and informal claims to land which do not fit in with land titling mechanisms inherited from the colonial era. International law has somewhat influenced the regional jurisprudence in its recognition of claims to land by marginalized groups against the state authority, particularly in terms of customary and collective land rights as evidenced in *Cal and others v Attorney General of Belize and another & Coy and others v Attorney General of Belize and another*[169] and *Maya Leaders Alliance et. al. v the Attorney General of Belize*.[170] Looking forward, Commonwealth Caribbean states may be able to facilitate a harmonious relationship between hard law and customary claims for land through the development of hybrid systems. Ideally, this would mean the building of relationships between state actors and marginalized groups to arrive at a syncretic situation. Such arrangement between the normative and the informal would bode well for the future development of rights based approaches towards the treatment of land. While at the international level there remains to be consolidation of the linkages amongst land and other rights such as housing, evictions, food, water and cultural rights, the notion of land rights as part of human rights law is expanding.[171] There however remains to be seen a

[169] *Cal and others* (see n. 102, p. 130).
[170] *The Maya Leaders Alliance et. al* (see n. 120, p. 134).
[171]As discussed in Jérémie Gilbert, 'Land Rights as Human Rights: The Case for a Specific Right to Land', *SUR International Journal on Human Rights*, 18 (2013), 115-136.

massive impact of international law on the region in terms of the evolution of domestic legislation aimed at addressing customary land use.

CHAPTER IV

LEGAL SYSTEM RESPONSES TO DIVERSITY AND EQUALITY IN THE COMMONWEALTH CARIBBEAN

Introduction

The Commonwealth Caribbean society comprises a myriad of diverse groups and various belief systems, notably various individual, religious, cultural and political beliefs. In re-iterating the objective of the thesis, the intention in this Chapter to consider legal system responses to diversity and equality in terms of the interplay between state based legal norms and soft law, as well as and the influence of international law on domestic legal systems.

A 'belief system' is defined by Converse as a "configuration of ideas and attitudes in which the elements are bound together by some form of constraint or functional interdependence."[1] In the sense of this overarching notion of belief systems, this chapter will look at how Commonwealth Caribbean legal systems manage equality and diversity. It will consider the changing landscape of diversity in the region during the post-emancipation period and establish a case for the departure from elements of homogeneity in the law in its treatment of addressing the protection groups of peoples in terms of their varied belief systems.

At the heart of the discussion on the role of law to support diversity of belief whilst also supporting equality reside the different approaches to equality. The complexity of how equality within society as a normative principle should be understood by the legal

[1] Philip E. Converse, 'The nature of belief systems in mass publics (1964)', *Critical Review: A Journal of Politics and Society,* 18 (2006), 1-74, (p. 3).

system is evident in the conflict of approaches when it comes to deciding whether to adopt a position of formal equality espoused through legal formalism as opposed to other approaches to equality. While formal equality captures the traditional approach of Commonwealth Caribbean legal systems, which is essentially viewing the concept of equality as being determined through a system of formal rules, the substantive equality approach for instance suggests that the emphasis should instead be on equality of outcomes. These two approaches will be discussed in terms of how either would benefit or constrain Commonwealth Caribbean legal systems. This chapter will also propose that in certain situations, the legal system ought to look beyond its legal construct of individualism protected through formalism and make decisions based on broader principles of equality and recognise some collective and group rights.

1. Legal Approaches to diversity in the Region

This section will consider the background to regional diversity within the Commonwealth Caribbean. It will then look at several decided cases which show how formalism might not always produce an equitable outcome in terms of providing a legal space for the protection of a belief system.

Background to regional diversity

Following the conclusion of slave emancipation by 1838, new ethnic groups were introduced to the Commonwealth Caribbean region, with one intention being to address the shortage of labour on the sugar plantations brought about by the termination of slavery. As Clarke elaborates:

> The first indentured labourers were Chinese, but they rapidly gravitated into the grocery trade, and Indians, known in the Caribbean as East Indians, soon became the staple of indentured immigration. Many Chinese quickly converted to orthodox Christianity, but most East Indians, where they formed large demographic

> components, retained ancestral commitments to Hinduism and Islam, though some Hindus converted to Catholicism or Canadian (Mission) Presbyterianism. In British Guiana East Indians eventually became the majority of the population, but in both Trinidad and Dutch Guiana they formed large minority segments standing outside the Creole colour-class stratification of whites, browns and blacks.[2]

By the late 19th century, the Syrians began establishing themselves in the region as traders and by the 1950's, Jews, Syrians and Chinese who were largely involved in trade "occupied status gap positions between the two upper social strata, and had converted to the elite religions of Roman Catholicism or Anglicanism."[3] Their social position contrasted to that of ethnic groups which had descended from runaway slaves, like the Maroons of Jamaica and the 'Bush Negroes' of Dutch Guiana or those Amerindians who still had communities in places like Dominica and Guyana.[4] As Clark notes, despite these groups having long histories in the Caribbean which could be traced back to slavery and past, by the post-emancipation period they remained considered as "outcast groups." [5] The 'Bush Negroes' and Maroons retained significant African elements in their religious beliefs and practices, although Clarke asserts that while the 'Bush Negroes' claimed their religion as African, it was actually created in a post-plantation context by the runaway slaves.[6]

Indian migrants, or 'East Indians' as they were commonly referred to, also largely retained their ancestral religions, which were mainly Hinduism and Islam. In Trinidad, the first group of Indians arrived in 1845 as indentured labourers who were contracted for a five-year period to provide labour on the plantations.[7] During a period of seventy years

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[2] Colin Clarke, 'Religion and Ethnicity as Differentiating Factors in the Social Structure of the Caribbean', *MMG Working Paper 13-06* (Göttingen: Max Planck Institute for the Study of Religious and Ethnic Diversity, 2013), 18.
[3] Ibid
[4] Ibid.
[5] ibid, 19.
[6] Ibid.
[7] Ibid.

of the indentureship scheme, 144,000 Indians arrived in Trinidad, with only 33,000 persons returning to India at the end of their contract.[8] Of the East Indians, Clarke writes:

> Fewer than 15 percent of Trinidad's East Indian immigrants were Muslims. Among the Hindu majority a wide range of castes was represented in the records. Agricultural castes were greatly in demand for work on the sugar estates, and together with the low castes and outcastes formed over two-thirds of the immigrants. A large number of Brahmins and Kshatriyas – many of them cultivators – also immigrated, and together accounted for more than 10 percent of Hindus. Members of the Brahmin caste, in particular, were crucial to the maintenance of the Hindu priesthood, Hindu rituals, and Hindu family structures and rituals, as indenture ended in the early 1920s and a rooted East Indian community came to be formed.9

Commonwealth Caribbean societies are therefore very much heterogeneous in terms of ethnicity, religion, culture and belief systems. Antoine in her book *Commonwealth Caribbean Law and Legal Systems*[10] argues however that despite there being varied ethnic and religious groups within the Commonwealth Caribbean, the law and legal systems of the region do not capture this reality. Antoine suggests that not enough is done in the Commonwealth Caribbean to protect ethnic groups and there is an overall failure of the law to reflect minority interests. She states that "in the eyes of the law they are all uniform subjects"[11] and that the prevailing norm is legal conformity "to a uniform, majoritarian, ideological position based essentially on an Anglo-Saxon, Christian type of morality and governance."[12] Antoine further argues that the value of a constitution is lacking where there is an absence of protection for religious freedoms and other freedoms involving differences from majority interests.[13] She strongly suggests that the prevailing law has lacked indication of evolution and dynamism to confront those

[8] Ibid.
[9] Ibid, 20.
[10] Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (New York: Routledge-Cavendish, 2008).
[11] Ibid, 11.
[12] Ibid, 112.
[13] Ibid.

spaces created by multiculturalism, whose roots can be largely traced to the colonial period.[14] On this point, Antoine states:

> The societies in the Commonwealth Caribbean have often been described as 'pluralistic.' This is taken to mean that there are several diverse ethnic, religious and class groups existing within these societies. While these groups make up one society, their cultural and social differences can still be identified. Despite this sociological classification, with few exceptions, such pluralism is not evident within the law and legal systems of the region. From a legal perspective, the Commonwealth Caribbean can be seen as a homogenous entity, joined by strong British legal ties. The major deviations are the hybrid legal systems of St. Lucia and Guyana....Yet even these hybrid systems do not seriously challenge the homogeneity of Commonwealth Caribbean law and legal systems. Within each country's legal system, homogeneity is also evident.[15]

This assertion of homogenous legal systems trapped in a position of mimicking the form of its English predecessor is quite a strong claim as it puts forward a representation of laws which remain strongly tied to a colonial common law that centres around Anglo-Christian values, and is unable to accommodate the legal affairs surrounding the progression of a diverse society. The adoption of this Anglo-centric institutional background is somewhat elaborated by Goulborne, who writes:

> [The] absence of natives has had a profound impact on West Indian sociopolitical thinking. It accounts in part for the further absence of any militant nativism in the politics of most of the societies in the region. Perhaps more importantly, however, it has meant that West Indians have seen themselves as just claimants to the Westminster/Whitehall political model of politics, government, administration and judicial institutions. In the not too distant past the essentially British foundations of major institutions meant that people also carried their British status in much the same sense that other settlers in the Americas have seen themselves as English, French,

[14] Ibid, 7.
[15] Ibid.

> Dutch and so forth. After all, the West Indies fell somewhere between being what Best calls colonies of exploitation and colonies of settlement (Best, 1968).[16]

It might be inferred from Goulborne's claim that a perception of entitlement in the early use of the Westminster model had shaped what now seems to be slow tendencies by regional legal systems to confront homogeneity in the law's treatment of diversity interests. In any event, static law which fails to address diverse populations is something which can undermine the rule of law, and Commonwealth Caribbean populations are in fact, diverse. Although the region has such a diverse constituent, judicial approaches suggest that the objective of the rule of law is to focus on formal interpretation and application of the law based on system of precedents as established during the colonial period. Such an approach based on formalism will now be considered looking at two issues that have formed an important issue within the jurisprudence, namely (1) the treatment of religious beliefs and (2) the issue of sexual orientation.

Treatment of religious beliefs by the courts

A substantial example of religious freedom being displaced by the demand to adhere to a legal, formal tradition was evident in *Enyahooma et al v Attorney General of Trinidad and Tobago.*[17] In *Enyahooma*, the Court of Appeal of Trinidad and Tobago was asked to make a determination on whether the applicant's constitutional rights to freedom of religion and equality were breached when a Magistrate requested that the applicant, who was dressed in a *jilabba* and a *tajh*, was asked to leave the court if he did not remove the *tajh* from his head. The appellant in his deposition stated:

> I told the Magistrate that what we were wearing were not hats but *Tahjs* (sic) which constitute part of religious garments. The Magistrate replied, "Well take it off or get

[16] Harry Goulbourne, *Ethnicity and Nationalism in Post-Imperial Britain* (Cambridge: Cambridge University Press, 1991), 181.
[17] Olive Enyahooma-El et al v Attorney General of Trinidad and Tobago [2004] CA CIV 104/2002.

> out of the Court. I then replied, "I am here for a matter" and the Magistrate and the Prosecutor shouted aloud to us "to get out of the Court."[18]

The Magistrate, in his response to the applicant, stated his position, saying:

> I noticed that a man remained seated at the back of the court with headwear…As presiding Magistrate I ordered that he either remove his headwear or leave the court as previously requested by the police officers. He rose and proceeded to leave without replying. It is not true that that person or anyone spoke to me and told me that he was wearing a tajh or that it was a religious garment and I deny that I made any reply...[19]

The Trinidad and Tobago Court of Appeal took the position that the magistrate bore no responsibility of having to enquire about the nature of dress of the applicant.[20] Instead the court held that the burden of proof was on the applicant to demonstrate the religious significance and beliefs associated with his way of dress and that there was no duty on a magistrate to ascertain the connection between a person's dress and his religious beliefs. Instead, the applicant, by the court's reasoning, ought to have provided the magistrate with the facts surrounding his way of dress in order for the magistrate to decide whether it was a genuine case of dress based on religious belief.[21] Accordingly, the Court of Appeal stated:

> The power of magistrates in sections 24 and 25 of the Summary Courts Act Chap 4: 20 to punish summarily disobedience to any direction, ruling or order is based on the premise that magistrates are entitled to make orders regulating proceedings in their courts. This power magistrates have enjoyed even prior to independence. Magistrates may *prima facie* exclude a member of the public from a court for refusing to remove headwear. Removal of headwear in the case of males is usually a sign of respect for the magistrate and a mark of the solemnity of the occasion. For the same reason,

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[18] Ibid, 5.
[19] Ibid, [6].
[20] Ibid, [8]-[10].
[21] Ibid.

> however, judges and barristers used to don wigs in the Supreme Court. If a member of the public raises a religious or other objection to a magistrate's order or direction it does not follow automatically that the magistrate must waive his or her order as regards the objector. Facts would have to be laid out before the magistrate to persuade him or her of the nature and quality of the objection, and, above all, to enable the magistrate to assess whether even if the objection is genuine, in his or her residual discretion the objector should be permitted to remain in court in the interests of the administration of justice.[22]

What is interesting from this passage is the reference of a power derived from a pre-independence tradition which vested in the magistrate the ability to make an order to regulate proceedings in the court, without the magistrate actually having any onus to make further enquiries as to what might be the beliefs of a person; and despite the possibility that those beliefs could have an influence on that person's behaviour or appearance in the court. A contentious area arising from this reasoning is whether in the interest of justice, magistrates should instead be more encouraging of dialogue in the process of making orders to regulate proceedings when it comes to recognition of behaviours shaped by religious and cultural beliefs. Dialectically, the challenge with the reasoning of the Court of Appeal is that it refused to explore the possibility of magisterial pro-activism in recognizing diverse beliefs within the courtroom which might be manifested in how those present inside the court respond to certain situations, or present themselves to the court.

In *Sumayyah Mohammed v Moraine and Another*[23] the High Court of Trinidad and Tobago again showed its approach of taking a "non-committal stance on the issue of religious plurality or discrimination."[24] In this case, the applicant and her parents who were Muslims brought judicial review proceedings challenging the decision of her school not to permit her to wear a *hijab* while at school. The school, which was established in

[22] Ibid.
[23] *Sumayyah Mohammed v Moraine and Another* CA.CIV.5/1995, (1995) 49 WIR 371.
[24] Antoine, *Law and Legal Systems* (see n. 10, p. 149), 8.

1902 and had become a public school under the Education Act of Trinidad and Tobago[25] followed school regulations made in accordance with the Act which *inter alia* required pupils to wear the school uniform.[26] The applicant's parents requested that the school permit the applicant to wear the *hijab* but the principal of the school and its board of management refused to allow any exemption to the uniform, despite accepting the sincerity of the belief of the applicant and her parents that the student was required by the Islamic faith to wear the *hijab*.[27] The principal and board of management informed the parents that if an exemption were allowed, other parents would also seek exemptions and that the uniform was a useful tool in administration, was conducive to good discipline, and created a sense of unity and of family.[28] The applicant proceeded to attend the school wearing a modified version of the school uniform which conformed to the *hijab* but she was prevented from attending classes, thereby effectually being suspended.[29] The applicant then instituted proceedings for judicial review of the decision to suspend her and also claimed redress for contravention of her constitutional rights under the Constitution of Trinidad and Tobago,[30] in particular those under section 4(a), the right to enjoyment of property, 4(b), the right to equality before the law and 4(d), the right to equality of treatment by public authorities.[31] The High Court held that the regulations regarding the dress code which were provided for under the Education Act were inflexibly applied by the respondents, and that the school should have taken into account the psychological effect on the student of refusing to allow her to wear the *hijab*.[32] The Court further held that there was no evidence to support the respondent's plea that the *hijab* would be conducive to indiscipline, threaten the traditional sense of loyalty to the school

[25] Chapter 39:1 of the Laws of the Republic of Trinidad and Tobago.
[26] *Mohammed* (see n. 23, p. 153).
[27] Ibid, 372.
[28] Ibid.
[29] Ibid.
[30] Chapter 1:01 of the Laws of the Republic of Trinidad and Tobago.
[31] *Mohammed* (see n. 23, p. 153), 372.
[32] Ibid, 403.

or highlight differences between students from affluent and non-affluent homes.[33] The Court however held that there was no breach of the applicant's constitutional rights. The Court took the position that the ability to attend the school of one's choice did not fall within the meaning of 'property' for the purposes of section 4(a) of the Trinidad and Tobago Constitution and deprivation of such right accordingly was not subject to constitutional redress.[34] Furthermore, it was held that in the absence of bad faith or hostile intention on the part of the respondents, the applicant's claim that section 4(b) (right to equality before the law) or section 4(d) (right to equality of treatment by a public authority) had been contravened had not been established.[35] In general, the approach by the court appeared to be reluctance in adopting a definite position on whether dress based on religious belief should be constitutionally protected.

Another instance where the courts have preferred a conservative and formalistic disposition in its consideration of a situation where religious freedoms might have been infringed is the case of *Re Orisa Movement EGBE*[36]. The Orisa Movement, also commonly known as the 'Spiritual Baptists' or 'Shouter Baptists' is a Yoruba derived but somewhat syncretic Afro-Caribbean religion based on communotheism whereby a community of various interdependent and interrelated gods are collectively unified by a common ontological source. In this particular case, the Orisa Movement brought an action before the High Court of Trinidad and Tobago in which they claimed that the broadcasting of a television programme on their religion by the state sponsored national television company had portrayed their group in a negative manner. In denying their claim, the High Court held that the national television company was an autonomous body which was not subject to constitutional litigation.[37] As Antoine explains, one of "the arguments raised

[33] Ibid, 404.
[34] Ibid, 399.
[35] Ibid.
[36] *Re Orisa Movement EGBE* [1983] TT HC 121.
[37] Antoine, *Law and Legal Systems* (see n. 10, p. 149), 54.

against their action was that as a corporate body, they could not enjoy freedom of conscience."[38]

In *Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc. and others v Attorney General of Trinidad and Tobago*[39] the appellants sought declarations that the national award of Trinidad and Tobago known as the Trinity Cross of the Order of Trinity breached the constitutional rights of non-Christians to equality, equal treatment and freedom of conscience and belief.[40] The name of this award was essentially a product of the colonial experience.[41] By Letters Patent dated 26 August 1969 a 'society of honour' was established by Her Majesty the Queen in Trinidad and Tobago by and with the advice of the Cabinet.[42] The purpose of this was to give recognition to those "citizens of Trinidad and Tobago and other persons who had rendered distinguished or meritorious service or for gallantry."[43] The appellants contended that as a Hindu and a Muslim, and as representative organisations of Hindus and Muslims existing in a multi-cultural and multi-religious society they were unfairly and discriminately encumbered in their ability to nominate persons, or to be nominated for, or accept the award because of its distinct and preferential recognition and depiction of Christian symbolism, theology and values.[44] They argued that Trinidad and Tobago embodies a unique historical, religious, cultural, and sociological background and therefore the continued existence of the award was discriminatory.[45]

From a constitutional perspective, section 4 of the 1976 Constitution, which enshrined fundamental human rights and freedoms and provided for their protection, had

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[38] Ibid.
[39] Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc. & Others v Attorney General of Trinidad and Tobago(SDMS) [2009] UKPC 17, (2009) 76 WIR 378.
[40] Ibid, 383-384.
[41] Trinidad and Tobago achieved independence in 1962 and in 1976 the country became a Republic.
[42] *SDMS* (see n. 39, p. 156), 456.
[43] Ibid.
[44] Ibid, 379.
[45] Ibid.

replaced section 1 of the 1962 pre-Republican Constitution.[46] Section 6(1)(a) of the 1976 Constitution provided, *inter alia*, that nothing in Section 4 was to invalidate an existing law, that is, any law that had effect as part of the law of Trinidad and Tobago prior to the commencement of the 1976 Constitution.[47] 'Law', defined in Section 3(1), included any enactment, and any Act or statutory instrument of the United Kingdom that before the commencement of the 1976 Constitution had effect as part of the law of Trinidad and Tobago.[48] The 1976 Constitution also contained a number of transitional and savings provisions.[49] Section 18 for example addressed enactments which had a narrower meaning than the word 'law' as defined by section 3(1) of the 1976 Constitution.[50] This section provided, *inter alia*, that enactments which were made under the 1962 Constitution and not declared void by a competent court on the basis of inconsistency with that Constitution would have full force and effect as part of the law of Trinidad and Tobago immediately before the commencement of the 1976 Constitution.[51] This would be the case even if such enactments were inconsistent with any provision of the 1962 Constitution.[52] On this basis, at the High Court it was held that:

> …the creation and continued existence of the Trinity Cross, given the historical, religious and sociological context of Trinidad and Tobago, combined with the experiences, as well as the religious beliefs of Hindus and Muslims, amounted to indirect adverse effects discrimination against Hindus and Muslims. However, by reason of the savings of existing law provision in the 1976 Constitution, the Letters Patent establishing the Constitution of the Order of the Trinity and the Trinity Cross were deemed to be existing law and therefore could not be invalidated for inconsistency with the s 4 rights and freedoms under the 1976 Constitution.[53]

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[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] Ibid, 379-380.

The High Court took the view that the Letters Patent which established the award meant that the name of the award was protected by virtue of the savings law clause. The Court of Appeal dismissed the applicant's appeal, following which an appeal was made to the Judicial Committee of the Privy Council (JCPC). At the JCPC the issue for determination was whether the Letters Patent which established the award was in fact part of existing law within the scope of Section 6(1)(a) of the 1976 Constitution.[54] The JCPC held that the appellants were entitled to a declaration that the name of the award breached their constitutional rights to equality and freedom of conscience and belief.[55] According to the JCPC, Letters Patent were "an ancient form of law-making under the Prerogative"[56] and the Committee doubted whether the Letters Patent could be saved as an existing law under the 1976 Constitution because it could not be considered an enactment within the meaning of section 18 of the 1976 Act.[57] The JCPC further stated that even if the exercise of Prerogative constituted to law-making, the issuing of Letters Patent in 1969 was limited by section 2(1) of the 1962 Constitution which provided that no law was to authorise the abrogation, abridgment or infringement of any of the rights or freedoms declared in section 1 of that constitution.[58] The patent itself according to the JCPC was therefore unconstitutional. Accordingly, it was held:

> …that the appellants were entitled to a declaration that creation of the Trinity Cross of the Order of Trinity established by the Letters Patent given on 26 August 1969 breached their right to equality under s 4(b), their right to equality of treatment under s 4(d) and their right to freedom of conscience and belief under s 4(h) of the 1976 Constitution, provided that nothing therein should be taken to apply to any awards of that high honour that were made under the system that the Letters Patent had established before the date of the Board's judgment. [Accordingly], the appeal would

[54] Ibid, 458.
[55] Ibid, 471.
[56] Ibid.
[57] Ibid.
[58] Ibid, 470.

be allowed and a declaration of invalidity to be applied prospectively would be made.[59]

In this regard, the JCPC concluded that the award was "an infringement of the rights and freedoms of members of the Hindu and Muslim communities in Trinidad and Tobago."[60] What is quite unfortunate about this case is that Trinidad and Tobago, after many years of being a Republic, had to make its way to the JCPC for a determination on whether the Letters Patent was protected by savings law provisions.

Gender and sexual identity on the courts

At the Caribbean Court of Justice (CCJ) level, there appears to be some apprehension by the court to indicate a definitive judicial position on the issue of Lesbian, Gay Bisexual and Transgender (LGBT) rights. This was evident in *Tomlinson v the State of Belize and the State of Trinidad and Tobago*[61] where the claimant was a Caribbean Community (CARICOM) national from Jamaica and a lesbian, gay, bisexual, transgender and intersex (LGBTI) activist. In his capacity as a LGBTI activist he regularly travelled throughout the Caribbean region.[62] He had travelled to Belize on two occasions and Trinidad and Tobago on four occasions and had never experienced any difficulties at the ports of entry, nor been asked by an immigration officer about his sexual orientation nor told an immigration officer that he was homosexual.[63] He claimed however that the defendants had prejudiced his enjoyment of his CARICOM right of free movement by virtue of legislative provisions in their immigration laws which expressly prohibited the entry of homosexuals.[64] Tomlinson referred to section 5(1) of the Belize Immigration

[59] Ibid 380.
[60] Ibid.
[61] Tomlinson v the State of Belize and the State of Trinidad and Tobago [2016] CCJ 1 (OJ), (2016) 88 WIR 273.
[62] Ibid, 279.
[63] Ibid.
[64] Ibid, 277-278.

Act[65] which states: "…the following persons are prohibited immigrants…(e) any prostitute or homosexual or any person who may be living on or receiving or may have been living on or receiving the proceeds of prostitution or homosexual behaviour…" and section 8(1) of the Trinidad and Tobago Immigration Act[66] which states: "…entry into Trinidad and Tobago of the persons described in this subsection, other than citizens and residents, is prohibited, namely…(e) prostitutes, homosexuals or persons living on the earnings of prostitutes or homosexuals, or persons reasonably suspected as coming to Trinidad and Tobago for these or any other immoral purposes."

Tomlinson, although not denying that both defendants appeared to have adopted a policy or practice which allowed homosexuals to enter their territories, contended that he had been prejudiced in the enjoyment of his right to free movement because there was genuine legal uncertainty surrounding what would happen on each occasion that he sought entry into either Belize or Trinidad and Tobago.[67] Additionally, he sought an order that the defendant states amend their immigration laws so as to remove homosexuals from any class of prohibited immigrants.[68]

The CCJ dismissed Tomlinson's claims against Belize and Trinidad and Tobago and refused the requested remedies. The Court recommended that CARICOM Member States should endeavour to ensure that national laws, subsidiary legislation and administrative practices are consistent with, and transparent in their support of the right of free movement of all CARICOM nationals.[69] The CCJ felt that this was a necessary aspect of the rule of law, which is the basic notion underlying CARICOM.[70] The CCJ also stressed that the rule of law requires clarity and certainty and therefore any discord

[65] Chapter 156 of the Laws of Belize.
[66] Chapter 18:01 of the Laws of the Republic of Trinidad and Tobago.
[67] *Tomlinson* (see n. 61, p. 159), 295.
[68] Ibid 281.
[69] Ibid, 295-296.
[70] Ibid.

between administrative practices and the apparent meaning of legislation is undesirable.[71] However, the CCJ held that Tomlinson was not in danger of being prejudiced by the Immigration Acts of Belize and Trinidad and Tobago. It held that the wording and context of the provisions of section 5(1)(e) of the Belize Act indicated that homosexuals are only prohibited from entering the country when they are seeking financial gain either by offering sexual services themselves or if they are profiting from those performed by others.[72] The CCJ further held that this section is to be considered in the context of the CARIOM treaty responsibilities of Belize, with section 3(2) of the Caribbean Community Act[73] making reference to section 64(1) of the Belize Interpretation Act[74] which states that when determining the meaning of any provision of an Act, consideration is to be given to "any provision of the Caribbean Community Treaty and any Community instrument issued under the Treaty, where relevant." The Court found that the practice of the administrative and executive arms of the state of Belize was to adhere to their treaty obligations.[75]

With regards to the Trinidad and Tobago legislation, the CCJ noted that the wording of section 8(1)(e) was different from that of Belize since it regarded "homosexuals" separate and apart from "persons who live on the proceeds of homosexuals."[76] Homosexuals were therefore a category of prohibited persons and therefore Tomlinson would appear to be prohibited from entry to Trinidad and Tobago. However, the CCJ felt that the approach of Trinidad and Tobago was a more liberal interpretation of the law, and despite the formal prohibition the CCJ found that Tomlinson has never been, and could never have been prejudiced in entering that country since its

[71] Ibid.
[72] Ibid, 288.
[73] Chapter 17 of the Laws of Belize.
[74] Chapter 1 of the Laws of Belize.
[75] *Tomlinson* (see n. 61, p. 159), 288.
[76] Ibid, 289.

Immigration Department does not apply the prohibition to CARICOM nationals who are homosexual.[77] The CCJ essentially took the view that this administrative practice amounted to an expression of official policy. The CCJ also found that Tomlinson enjoyed a legal right of entry under section 3 of the Immigration (Caribbean Community Skilled Nationals) Act[78], which requires immigration officers to allow skilled CARICOM nationals who hold a 'skills certificate', entry into Trinidad and Tobago, notwithstanding any other written law.[79] The CCJ felt that the practice of admitting homosexuals of other CARICOM states is not discretionary but instead legally required by Article 9 of the Revised Treaty of Chaguaramas (RTC)[80] as an "appropriate measure" to ensure the carrying out of obligations arising out of the Treaty or resulting from decisions taken by CARICOM.[81] In this regard the CCJ decided that the inclusion of this Treaty provision into the domestic law of Trinidad and Tobago, through its Caribbean Community Act[82] meant that this legal requirement equally exists within the domestic legal system of that state, notwithstanding any contradictory provision in the earlier Immigration Act.[83]

In essence, the CCJ's reasoning in *Tomlinson* steered clear of any attempt to consider the historical development of laws criminalizing homosexuality in the Commonwealth Caribbean, and international developments which have strengthened the case for legal rights being afforded to the LGBT community in the region. Following the decision of *Tomlinson* however, the Trinidad and Tobago High Court in *Jason Jones v Attorney General of Trinidad and Tobago*[84] declared that country's 'buggery' laws unconstitutional and adopted the view that sexual orientation is an essential attribute of

[77] Ibid, 291.
[78] Chapter 18:03 of the Laws of the Republic of Trinidad and Tobago.
[79] *Tomlinson* (see n. 61, p. 159), 293.
[80] Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy (entry into force 4 February 2002) 2259 UNTS 293 (RTC).
[81] *Tomlinson* (see n. 61, p. 159), 295.
[82] Chapter 81:11 of the Laws of the Republic of Trinidad and Tobago.
[83] *Tomlinson* (see n. 61, p. 159), 297.
[84] Jason Jones v Attorney General of Trinidad and Tobago [2018] HC Claim No CV2017-00720.

privacy, which is intrinsically linked to human dignity.[85] Accordingly, Justice Rampersad stated:

> To this court, human dignity is a basic and inalienable right recognized worldwide in all democratic societies. Attached to that right is the concept of autonomy and the right of an individual to make decisions for herself/himself without any unreasonable intervention by the State. In a case such as this, she/he must be able to make decisions as to who she/he loves, incorporates in his/her life, who she/he wishes to live with and not have to live under the constant threat, the proverbial "Sword of Damocles", that at any moment she/he may be persecuted or prosecuted.[86]

From this passage, the court suggests a relationship between safeguarding the rights of an individual and the protection of a larger group. In a sense, *Jones* signalled a departure from a formal approach in its recognition that the existing law had the propensity to marginalize homosexuals. Despite the decision in *Jones* however, generally the Commonwealth Caribbean jurisprudence suggests that the approach is one of judicial formalism in regard to how an understanding of equality should be constructed. The cases and related social issues serve as a microcosm of larger problem in terms of how the legal system intertwines with belief systems, with that problem being a conflict in the operation of practical knowledge and formal procedure. Scott, in referring to the concept of *mētis* which is the type of practical knowledge that the ancient Greeks believed carried Odysseus through his adventures, argues that formal epistemic knowledge is too particularistic and simplifies social realities.[87] The core conflict is that practical knowledge and formal knowledge are very opposite in their characteristics and operation. Whereas formal knowledge is more explicit and general, practical knowledge tends to be local and implicit. According to Scott, through formal knowledge, the social reality is

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[85] Ibid, [91].
[86] Ibid.
[87] James Scott, Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed (London: Yale University Press, 1998), 313.

reduced to standardized facts and written documentary which are more of a static and aggregate character.[88] The outcome is that a system based on a mapping of social reality through standardization cannot justify its rationality because it is unable to address complexities in natural and social processes.[89]

2. Inadequacies of formalism vs. other approaches to equality

A formal approach to equality in a sense suggests an interpretation of laws within a realm which is suspended from things such as judicial activism or further enquiry beyond the scope of legal doctrine. Instead the focus is on the law itself, and how it should be interpreted with itself. According to Atiyah:

> Formalism really represents an attitude of mind rather than anything else; the attitude is that of the judge who believes that all law is based on legal doctrine and principles which can be deduced from precedents; that there is only one "correct" way of deciding a case; that it is not the function of the judge to invoke policy considerations, or even arguments about the relative justice of the parties' claims; that the reasons behind principles and rules are irrelevant; that the role of the judge is purely passive and interpretive; that law is a science of principles, and so on.[90]

Atiyah goes on to describe the growth of formalism:

> From 1850 or thereabouts, the phenomenon of formalism took an increasing hold upon English legal thought. I have sketched above the principal characteristics of formalism as it affected English law, in particular, it involved rejection of the law-making power of the judge, rejection of the relevance of policy issues to legal questions, belief that law was a deductive science of principles, and that the one "true" answer to legal questions could be found by a strictly logical process. It involved also a belief in the objective reality of legal concepts, so that, for example, lawyers came

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[88] Wibren van der Burg, The Dynamics of Law and Morality: A Pluralist Account of Legal Interactionism (Surrey: Ashgate Publishing, 2014), 22.
[89] Ibid.
[90] Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979), 338.

> to see the answer to legal issues as depending on the "true" delineation of concepts such as offer, acceptance, consideration, estoppel, and a variety of others. The notion that legal concepts and categories were merely tools by which the lawyer could arrive at a range of justifiable decisions was not so much rejected, as simply not entertained by most English lawyers. And inextricably involved in this development was the gradual decline of the influence of external factors or bodies of thought on the law. It was, indeed, partly because lawyers could no longer find their answers in broad theories about society, or political economy, or moral principles, that they increasingly turned inward to the law itself.[91]

It is challenging to argue however that in a common law system, formal law as it exists provides a level playing field when it comes to access to diversity rights by groups within the society. This is explained further by Pejovich who states:

> As an outgrowth of the hand of the past, common law has never emphasized social justice, the common good or other vague terms legislators and bureaucrats use as the façade of words hiding their preference for top-down regulations. The focus of common law has always been on the protection of individual freedom, free exchange and private property rights. And the consistent protection of individual freedom, free exchange and private property rights means that common law has been in tune with the capitalist culture that emphasizes self-interest, self-determination and self-responsibility.[92]

It would be unfair however to blame the current Commonwealth Caribbean legal systems which are of the common law tradition as lacking morality because of their apparent withdrawal from social justice issues brought about by formal approaches to legal interpretation. Admittedly, however, the common law enables a capitalist culture of which moral interests do not feature at the forefront of the system. Although Weber's classification of legal systems characterized by formal rationality carry with it the weight

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[91] Ibid.

[92] Svetozar Pejovich, *Law, Informal Rules and Economic Performance* (Massachusetts: Edgar Allen Publishing, 2008), 143.

of being voided of considerations of social justice, the common law actually incorporated customs and traditions up to the beginning of the twenty-first century. Accordingly, Pejovich writes:

> Moreover, common law is not amoral. Only informal rules that meet a shared notion of ethics can survive the test of time. Common law precedents have passed the test of time, not because they were reasoned to be socially just or politically correct, but because they subsumed customs and traditions. Hence the moral context of the hand of the past is implicit in common law precedents. To say that common law is institutionalized tradition and customs requires an explanation. Translating informal rules into formal laws is not analogous to putting a dime in the machine and getting out the written version of informal rules. Different judges have different subjective perceptions of prevailing informal rules. Their understanding of the basic legal principles is not necessarily the same. It is, then, fair to say that, while the process of creating formal rules in common law countries subsumes the hand of the past, it also bears the imprint of actions by common law judges.[93]

The legitimacy of the common law was thus founded on informal rules in the form of local customs and traditions which were actually linked to rising individualism in England. The difference in the Commonwealth Caribbean however is that the link between individualism within an informal system which subsumes the customs and traditions of diverse groups, and formal law is yet to be rationalized.

Despite the common law being informed by custom and tradition, the notion of collective rights is actually counter intuitive to that of capitalism in terms of concepts such as methodological individualism and classical liberalism, which are both features of capitalism and the legal systems which protect it.[94] The rationality of how individualism in general works is that humans are able to come to certain resolutions based on their

[93] Ibid, 142.
[94] Ibid, 26.

individual assessments of knowledge acquired through their human experience. Accordingly, Pejovich states:

> Individualism means that human action is the result of emotions, desires, preferences and evaluations that only the individual can develop and appreciate. Decisions made by governments, parliaments, corporations and other organizations are actually decisions made by individuals. Individuals conceive ideas, invest time and effort in formulating policies, convince others to accept their ideas and bear the risk of failures.[95]

Pejovich further describes the ideology behind individualism, stating:

> The culture of individualism rewards competitive performance, promotes risk taking and views income inequalities as desirable results of entrepreneurship and free trade. It sees the community as a voluntary association of individuals who, in the pursuit of their private ends, join and leave the community by free choice. Holding the individual to be superior to any group encourages behaviour based on the principles of self-interest, self-responsibility and self-determination.[96]

In its classical sense, moral justification for individualism in the West was found in the concept being rooted in theological approaches centered on the Christian value that God created individuals and not collectives.[97] Individualism assumes a direct link between the individual and God, and the effect is that the individual holds the knowledge of what is good for himself, and therefore has the ability to make choices based on this. The ability to make ethical decisions therefore comes from within – the sacred *self*. The idea of individualism has been confronted by events such as the Enlightenment, the French Revolution and ideologies such as socialism, which sought to challenge the idea of individual liberty with that of a common good which is defined by the elite.[98] Defenders of methodological individualism argue however that it is meant to be removed

[95] Ibid.
[96] Ibid, 27.
[97] Ibid.
[98] Ibid.

from political or ideological motivation, with Weber cautioning that "it is a tremendous misunderstanding to think that an 'individualistic' method should involve what is in any conceivable sense an individualistic system of values."[99]

Like individualism, classical liberalism also gives priority to individual freedom. In explaining, classical liberalism, Pejovich states:

> Classical liberalism is about individual liberty, openness to new ideas, tolerance of all views, private property rights, the rule of law and the freedom of contracts. Individual liberty, openness to new ideas and tolerance of the values held by others create an environment in which individuals are free to pursue their private ends. In a classical liberal society individuals are expected to tolerate one another's preferences, while the state is expected to protect those preferences from external interference (including by the state itself).[100]

The way in which classical liberalism and individualism has been incorporated into the capitalist system, which as discussed, appears to be protected by legal formalism, has taken different forms in England and Continental Europe. Whereas Continental Europe leaned towards collective rulings on social issues, liberalism in England favoured "piecemeal resolution of social issues via voluntary interactions among freely choosing individuals."[101] The English form of classical liberalism is in a sense demonstrated in Commonwealth Caribbean legal systems, which allow for formal rules that enable individuals the freedom to pursue their private ends and to form contractual relationships. The formal system under this approach therefore seeks to provide a framework to facilitate the objectives of individual interaction instead of being concerned with seeking specific outcomes. In a sense, the European approach theoretically suggests a method which addresses diversity and a unified society. It is based on the assumption that a just

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[99] Max Weber, *Economy and Society* eds.by Guenther Roth and Claus Wittich (California: University of California Press, 1978), 18.
[100] Pejovich, *Law, Informal Rules and Economic Performance* (see n. 92, p. 165), 27.
[101] Ibid, 28.

society exists, and that formal rules which achieve that just society is discovered by human reasoning. From these assumptions, a *raison d'être* for the support of social engineering is established, as well as a political justification for governments to pursue it.[102] The difference between the Continental approach and the English and American approach is that the role of the powerful state has never been seriously questioned as the state is embraced as overseeing all individual action, including those in the economic domain.[103] There is a mistrust in the economic system being left to organize itself, and undiluted capitalism is thought to be unfavourable.[104]

The most famous assault on formalism was led by the Legal Realists of the 1920's and 1930's who attacked the core of formalism, which was the argument of judges being constrained by understanding the logic of highly abstract legal principles.[105] What the legal realists did was to challenge the concept of law being regarded as an autonomous system of rules and principles which was fluid enough in its operation so as to enable the legal system to arrive at outcomes which captured judicial objectivity, since the system allowed for judges to reach decisions which were discernible and politically independent.[106] If the system was not as objective as formalism actually proposes, it would suggest operational flaws and inconsistencies in decisions caused by subjectivity created by the political, social and moral inclinations of judges. If this were actually the circumstance, then it would give rise to a question of judicial legitimacy and whether judges are attempting to play the role of technocrat.

The view also exists that the suppression of collective rights can actually be counterintuitive to the protection of the freedom of the individual. Kymlicka explains that

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[102] Ibid, 29.
[103] Ibid, 30.
[104] Ibid.
[105] Brian Tamanaha, *On the Rule of Law - History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 77-79.
[106] Ibid.

the fear exists that collective rights "demanded by ethnic and national groups are, by definition, inimical to individual rights."[107] However, he goes on to list three types of group-differentiated rights which help to "reduce the vulnerability of minority groups to the economic pressures and political decisions of the larger society."[108] These are, "special group representation rights within the political institutions of the larger society"[109] which makes it less likely that a national or ethnic minority will be marginalized in the country-wide decision making process; "self-government rights"[110] to devolve powers to smaller political units to protect the minority group from being "outvoted or outbid by the majority on decisions that are of particular importance to their culture"[111]; and "Polyethnic rights"[112] which would "protect specific religious and cultural practices which might not be adequately supported through the market"[113] or which might be unintentionally disadvantaged by existing legislation. Kymlicka further interestingly argues that "minority rights are not only consistent with individual freedom, but can actually promote it."[114] He contends that the modern world is divided into 'societal cultures' typically associated with national groups, which through its practices and institutions "cover the full range of human activities, encompassing both public and private life."[115] He further contends that individual freedom is "intimately tied up with membership in these cultures."[116] Accordingly, freedom is dependent on the presence of a societal culture, and therefore it "matters that national minorities have access to their own culture."[117] In essence, Kymlicka states that there are certain cultural preconditions

[107] Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (Oxford: Clarendon, 1995), 35.
[108] Ibid, 37.
[109] Ibid.
[110] Ibid.
[111] Ibid, 37-38.
[112] Ibid, 38.
[113] Ibid.
[114] Ibid, 75.
[115] Ibid.
[116] Ibid, 76.
[117] Ibid.

that need to be satisfied in order to achieve freedom of choice, and therefore issues of cultural membership need to be incorporated into the liberal principles which focus on individualism.[118]

3. Philosophical and Legal underpinnings of the existing system

The Commonwealth Caribbean legal systems seem to be dominated by an environment of formalism in how the law and equality is understood and administered harboured a conservative environment in the transition from colonialism to independence. It is debatable as to whether this was an intended design. Yet, operationally conservative mechanisms within the political and legal frameworks of Commonwealth Caribbean societies in the aftermath of colonialism suggests an ideal approach to preserving legal norms and preventing revolutionary Marxist/Leninist challenges from within the society on how the society and rule of law should be structured. Weber explores the relationship between formalism and capitalism in *Economy and Society*[119] where he places legal systems into various categories, with one being 'formal rationality.'[120] According to Weber, legal systems falling into this category display the characteristic of judges who apply highly abstract rules through a process he describes as the "logical analysis of meaning"[121] which is essentially the formalistic approach. Weber posited that the "logical analysis of meaning" approach produced outcomes which voided considerations of justice from the legal decision making process.[122] On this point, Kennedy explains:

> Logically formal rationality is most definitely not necessary in order for the mode of authority to be ideal-typically legal. All that is needed is that the mode of lawfinding to be sufficiently "formal" - that is, rule-bound - so that lawfinding is plausibly

[118] Ibid.
[119] Weber, *Economy and Society* (see n. 99, p. 168)
[120] Ibid, 657.
[121] Ibid.
[122] Ibid, 892.

> impersonal. For example, there are types of formal legal rationality that are not "logical," including particularly the English common law.[123]

This form of law and legal interpretation according to Weber was unique to Western legal systems and enabled the rise of capitalism in that part of the world.[124] Essentially, it excluded morality as an appropriate legal consideration, consequently allowing for the legal system to develop a structure which facilitated the free market economy. Raban explains this further in stating:

> So long as morality was allowed to impact legal resolutions, the legal rules that allow capitalism to thrive were often sacrificed for justice; only when morality was out of the way could the legal system provide the necessary legal underpinning for a truly free market economy. For example, allowing property rights to drive the destitute from land they had occupied for generations, or enforcing a contract even if it spelled ruin to one of the parties, or exempting commercially beneficial activities (like newly developed railways) from compensating for injuring they had caused absent a demonstration of negligence, are all results that may appear unjust but may be essential for a successful market economy.[125]

This claim puts forward a view of a tension between conservativism and popular justice because of the conservative penchant for formalism. However, as Raban also discusses, the tension might not mean that one group has a higher claim to morality than the other. On this point, Raban states:

> But why think that conservative positions are less moral than liberal ones? The answer cannot be based, à-la Weber, on a conservative belief in capitalism, since American liberals are also advocates of a free market economy. Liberals are capitalists too—but they are no formalists. In any event, conservative formalists surely believe that their

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[123] Duncan Kennedy, 'Weber and the Sociology of Revolution', in Charles Camic, Philip Gorski and David Trubek (eds.) *Max Weber's 'Economy and Society': A Critical Companion* (Stanford: Stanford University Press, 2005), 330.
[124] David Trubek, 'Weber on Law and the Rise of Capitalism', *Wisconsin Law Review* (1972), 720-753, (p. 721).
[125] Ofer Raban, 'Between Formalism and Conservatism: The Resurgent Legal Formalism of the Roberts Court', *New York University Journal of Law and Liberty*, 8 (2014), 343-393, (pp. 368-369).

> substantive positions are the moral ones, and that the liberal agenda (abortion rights, welfare rights, criminal defendants' rights, strong federal power at the expense of local democracy, etc.) is the one in conflict with popular morality.[126]

Notwithstanding this debate on morality, Commonwealth Caribbean states have historically displayed reactionary tendencies which lean towards preservation of the status quo. Reactionary responses by Commonwealth Caribbean policy makers were evident during the Civil Rights Movement in the United States, where citizens of Commonwealth Caribbean countries played a part in the call for racial de-segregation and legal recognition of the rights of African Americans.[127] At the same time, in the Commonwealth Caribbean itself, the 'Black Power Revolution' in Trinidad and Tobago witnessed both Afro-Caribbean and Indo-Caribbean individuals marching together for socio-political change. Then, in Grenada in 1979, Maurice Bishop and his New Jewel Movement lead an armed uprising in response to what he thought was the failure to create a system of 'grassroots' democracy in that country.[128] Bishop was seen by the United States as a threat to their hegemony in the region, particularly because of his Marxist/Leninist beliefs and his ties to Cuba and the Soviet Union.[129] He was later executed in 1983 following an invasion of the island by the United States Army. What would have been ideal opportunity for legal reform across the Commonwealth Caribbean instead developed into a situation where regional governments viewed rights-based activism and calls for social reform as a threat to the state, and associated it with a type of socialism which would endanger the Westminster tradition. According to Goulbourne:

> In the West, including the Commonwealth Caribbean, governments were afraid of the new wave of militancy emanating from the United States as a result of the civil rights movement and the opposition to the war against Vietnam. In the English-speaking

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[126] Ibid, 369-370.
[127] Goulbourne, *Ethnicity and Nationalism in Post-Imperial Britain* (see n. 16, p. 151), 177.
[128] Antoine, *Law and Legal Systems* (see n. 10, p. 149), 297.
[129] Peter Shearman, 'The Soviet Union and Grenada under the New Jewel Movement', *International Affairs (Royal Institute of International Affairs 1944-)*, 61:4 (1985), 661-673, (p. 661).

> Caribbean the black power slogan which West Indians had helped to proclaim in the USA appeared to pose a threat to regimes. For example, Stokeley Carmichael (now Kwame Ture), himself a Trinidadian by birth, was refused entry into the country by Eric Williams. Walter Rodney's ban in Jamaica was part of the response of the state to this general situation in the region as a whole. But there were other developments. Leading academics such as George Beckford had their passport confiscated, thereby restricting their movements. Guyanese academic and intellectual, Clive Thomas, and Ken Post the outspoken British political analyst, were also denied entry into Jamaica. Moreover, following the Grenada invasion in 1983, which he supported, the prime minister of Jamaica, Edward Seaga, brought to parliament a list of names of well-known Jamaicans who had apparently visited either Havana or Moscow. These people, by virtue of having been to these two cities were, by implication, dangerous to the welfare of the country.[130]

Lent contends that the three Commonwealth Caribbean states that adopted socialist governments in the past - Grenada, Guyana and Jamaica, witnessed difficulties in government-media relationships primarily because of a fundamental distrust of socialism by conservative media which are tied to big business interests[131]:

> In both Jamaica and Grenada, much of the protest against the governments' media tactics came from the big business sector, which, in the name of press freedom, protected its vested interests by denouncing socialism. In Jamaica especially, once Manley steered his government to the socialist position, there was very little he could do that was right in the eyes of the *Gleaner*. If, as reported in Jamaica and Grenada, the CIA supported local media in plots to overthrow the leaderships, then this itself is a very serious infringement of a right-the right to national sovereignty.[132]

It is arguable that preservation of the status quo as evident by the reactions of Commonwealth Caribbean territories enables legal certainty in the sense that all

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[130] Goulbourne, *Ethnicity and Nationalism in Post-Imperial Britain* (see n. 16, p. 151), 177.
[131] John A. Lent, 'Mass Media and Socialist Governments in the Commonwealth Caribbean', *Human Rights Quarterly*, 4 (1982), 371-390, (p. 371).
[132] Ibid, 390.

normative institutions and values are also being preserved. According to Weber, this type of legal certainty created by legal formalism was essential for the functioning of capitalism.[133] Kennedy believes that conservativism and formalism share a similar rhetoric and also links them through the notion of legal certainty as both concepts trust in the absolute importance of a defined legal order which is also predictable.[134] Preserving legal certainty therefore meant protection of the Westminster system and a trust in the model of a unitary state governed from the centre by virtue of an executive who in the national interest pursues policies applicable to all sections of the society that they believe amount to a public good.

It is somewhat difficult to argue that the best means for constitutional change should be by way of revolution. Likewise, it is also challenging to assert that gradual changes over a period of time is the better process to accomplish constitutional reform. Nonetheless, revolution is generally considered as a catalyst for constitutional change, as influenced by changes in the social, economic and political approaches to configuration of the state. While it has previously been discussed that constitutional change in the Commonwealth Caribbean appears to be slow, and gradual, it was also discussed with reference to the Grenada revolution that the process of constitutional change could also appeal to revolutionary approaches.

Revolution has often been synonymous with a resistance to the established political and socio-economic order by persons who feel in a disadvantaged position. Ernesto 'Che' Guevara for instance developed the *foquismo* or 'foco theory' which proposed that revolutionary guerrillas "should move to immediately launch a guerrilla

[133] Weber, *Economy and Society* (see n. 99, p. 168), 883.
[134] Duncan Kennedy, 'Form and Substance in Private Law Adjudication', *Harvard Law Review*, 89 (1976), 1685-1778, (p. 1738).

war on regular armies in countries with high levels of rural poverty and repressive states."[135] As Arana, May and Schneider explain,

> The foco theory makes the claim that revolutionary guerrillas could successfully leverage their strategic advantages by appealing to oppressed *campesinos*, and carrying out acts of sabotage on regular armies in remote regions of poor countries where regular armies would be unfamiliar with the terrain…..The most important element of *foquismo* was the idea that the popular will for revolution could be created by a popular insurrection. This eliminated the need for potential revolutionaries to organize a revolutionary vanguard, or even to do massive peasant or worker organization and education campaigns…..This foco would eventually (and inevitably) grow into a regular army capable of defeating the forces of oppression. What this meant for social activists in other poor and less developed countries, particularly and explicitly the other countries of Latin America and the Caribbean, was that revolutionary armed struggle could be initiated immediately.[136]

It is from this context that one ought to consider what exactly would bring about this type of revolutionary attitude, and whether it can be legally justified. According to Tushnet, a constitution reflects the will of the people, with the constitution containing provisions which are considered at the time unamendable.[137] However, he argues that there can exist 'unconstitutional' constitutional amendments, and this would bring to the forefront deep questions about the constitutional foundation. Under these circumstances, Tushnet claims that revolutionary actions can adopt a legal form, and in explaining this process he writes:

> Suppose that the people at time-two want to replace the unamendable provision. They are given authoritative legal judgments—by the courts or by their legal advisers—that they cannot use the ordinary methods of constitutional

[135] Roberto González Arana, Rachel A. May and Alejandro Schneider, *Caribbean Revolutions: Cold War Armed Movements* (Cambridge: Cambridge University Press, 2018), 1.
[136] Ibid., 8.
[137] Mark Tushnet, 'Peasants with pitchforks, and toilers with Twitter: Constitutional revolutions and the constituent power', *International Journal of Constitutional* Law (2015) Vol. 13 No. 3, 639-654, (p. 640).

> amendment to do so. They then nonetheless deploy the methods they believe authorized by law to replace the existing constitution: They use public resources to conduct a referendum in which the constitutional change they seek receives substantial popular approval. They again receive authoritative legal judgments that such methods cannot be used to put in place a constitution that omits the unamendable provision, and that the purported amendment is not part of the nation's constitution. They then declare that they have "altered and abolished" the government created by the existing constitution and put a new one in place.[138]

As such the citizens would have "accomplished a legally effective amendment of the unamendable provision, by exercising their right of revolution."[139] However, Tushnet views such a process as being equivalent to a *pro tanto* constitutional revolution which can be actualized without resort to the type of violence that is often associated with revolutions in politics.[140] Tushnet also asserts that revolution in itself cannot be proceduralized – "we would gain nothing by saying that a set of events that actually transformed a nation's constitutional identity did not count as a revolution because, for example, it occurred without substantial violence."[141] Accordingly, not all constitutional revolutions may be considered violent, and can sometimes be realized by utilizing existing legal forms.[142]

The need for constitutional change might not also be a sole factor in harnessing a revolution. Meeks for instance argues that revolutions should be delinked from teleological notions of history as they are instead "highly complex events located in a particular time and place, each in turn influenced and transformed by the preceding accumulation of revolutionary experiences."[143] This was demonstrated in Grenada for

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[138] Ibid., 640.
[139] Ibid., 642.
[140] Ibid., 649.
[141] Ibid.
[142] Ibid., 653.
[143] Brian Meeks, *Caribbean Revolutions and Revolutionary Theory: An Assessment of Cuba, Nicaragua and Grenada* (London: Macmillan Press, 1993), 187.

example with the formation of the revolutionary New Jewel Movement (NJM), which was a combination of the Movement for the Assemblies of the People (MAP) and the Joint Endeavour for Welfare, Education, and Liberation (Jewel). Meeks demonstrates that Jewel had close ties to the "rural pulse and possessed a far more black-power, self-reliant tradition, drawing freely on the evangelical, almost mystical view of black liberation which was an important trend in the Trinidad black power movement."[144] However, MAP's appeal was with its "well-connected and economically independent core of lawyers and its more developed ideological platform"[145] which was based on their interpretation of C.L.R. James's concept of Marxism.[146] Following the establishment of the NJM however, Meek argues that the party displayed a shift away from the previously dominant Jamesian model and instead adopted a Leninist philosophy.[147]

If one agrees with Meek's expansive spatial description of what contributes to a revolutionary movement, one can contended that there might be no definite or correct answer as to whether constitutional change in the Commonwealth Caribbean could be more appropriately achieved by means of revolution, instead of through gradual changes in the rule of law as time passes. While certain unique conditions might give rise to an armed revolution, by virtue of Tushnet's argument, through the utilization of public avenues such as referendums and legal proceedings, the rule of law can be utilized in a revolutionary manner to bring about changes without having to resort to violence.

Detraditionalisation and Institutional influences

Detraditionalisation is based on the argument that capitalism and its associated mass consumer culture undermines the value of traditional culture, thereby making it lose

[144] Ibid., 145.
[145] Ibid., 146.
[146] Ibid.
[147] Ibid., 151.

aspects of its normative qualities.[148] Heelas for instance argues that while culture represented a moral authority to set apart what is important from what is not, this process is now being weakened.[149] Accordingly, Heelas states:

> …people have to turn to their own resources to decide what they value, to organise their priorities and to make sense of their lives. That is to say, the weakening of traditional bonds to cultural values, social positions, religion, marriage and so on, means that people find themselves in the position where they have to select from those packaged options or styles to which the cultural realm has been reduced in order to construct their own ways of life.[150]

In a sense, individualism can be considered as something which enables a positive action of allowing individuals to live without being restricted by norms which reflect tradition and therefore allows the individual autonomy to contemplate and achieve their full human potential. However, Lõhmus explains that individualism actually is shaped by institutionalized influences.[151] Lõhmus suggests:

> ....the claim to autonomy and self-realisation has been increasingly made into something of an institutional demand – an expectation set by media, the capitalist economy, and legal regulations, demanding that individuals present themselves as being flexible, active, inventive, resourceful and willing to develop themselves if they wished to achieve success in their profession or in society. What is demanded is a vigorous model of action in everyday life, which puts ego at its centre. "Responsibility" means now, first and last, responsibility to oneself ("you deserve this", "you owe this to yourself "), while "responsible choices" are, first and last, those moves which will serve the interests and satisfy the desire of the actor. To individualism corresponds the liberal virtue of independence – the disposition to care

[148] Katri Lõhmus, Caring Autonomy - European Human Rights Law and the Challenge of Individualism (Cambridge: Cambridge University Press, 2015), 121.
[149] Paul Heelas, 'Introduction: Detraditionalization and its Rivals' in Paul Heelas, Scott Lash and Paul Morris (eds.), *Detraditionalization: Critical Reflections on Authority and Identity* (Oxford: Blackwell, 1996), 1-20, (p.5).
[150] Ibid.
[151] Lõhmus, *Caring Autonomy* (see n. 148, p. 176), 126-127.

> for, and take responsibility for oneself and avoid becoming needlessly dependent on others. If you are poor or unemployed, it is because you are lazy or lack willpower.[152]

It is in this context that Lõhmus puts forward the view that demands for self-sufficiency suggests that persons will behave self-servingly instead of caringly, and that there is an absence of trust. This element of trust is actually a feature of traditionalism and is linked to certainty in the sense that the liberal, autonomous individual who is moving away from rules which form traditional norms is now responsible for discovering certainty and inventing rules. This in itself creates chaos because those reference points for what might have been considered authoritative behaviour are now voided.

Utilitarianism and group rights

Utilitarianism promotes group rights above individual rights in the context that individual rights can be protected by empowering the group.[153] Although the ultimate objective of formal approaches is to protect the individual, this paradoxically can be accomplished by favouring the group over the individual. In a sense, this approach suggests that there is subjectivity in the sentiments which are understood to constitute individualism.

Bentham discusses the subjectivity of individualism in the context that if one individual does not consider a particular act as being pleasurable, this does not mean that another person or group of persons should be prohibited from engaging in the act, as different individuals possess varying susceptibilities in terms of their perceptions of pleasure and pain. Accordingly, Bentham writes:

> To every man what is the greatest pain? That which in his own judgment, assisted by his own memory, and through that printed upon his own feelings, is so. Reader,

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[152] Ibid.
[153] Philip Schofield, *Utility & Democracy: The Political Thought of Jeremy Bentham* (Oxford: Oxford University Press, 2006), 126.

> whoever you are, ask of yourself and answer to yourself these questions: Is there—can there be—that man who knows or who can know as well as yourself what it is that has given you pleasure or what it is that has given you most pleasure? Of these observations what is the most obvious practical conclusion? That, being the best judge for himself what line of conduct on each occasion will be the most conducive to his own well-being, every man, being of mature age and sound mind, ought on this subject to be left to judge and act for himself: and that every thing which by any other man can be said or done in the view of giving direction to the conduct of the first, is no better than folly and impertinence.[154]

This type of subjectivity also influenced Bentham's view that each individual had an equal right to the total happiness which his nature allowed.[155] Although Bentham considered that every individual on each occasion pursued his self-interest with his conduct being subject to the limitations of his motives, this did not mean that the individual on every occasion *ought* to pursue his own interests.[156] The legislator would therefore lack absolute and certain knowledge of the feelings of others, despite of being asked to take account of them.[157] The utilitarian legislator however, although acknowledging that there might not be certainty that a particular decision would promote the greatest happiness, would still be prepared to give reasons to justify the measures which he has decided on.[158] Bentham also criticised the common law incorporation of natural law through the epistemological argument that the concept of natural rights in a metaphysical sense is absurd because of the question of access to the metaphysical realm on the basis that either the this realm does not exist, or it cannot be perceived.[159]

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[154] Jeremy Bentham, Deontology together with A Table of the Springs of Action and Article on Utilitarianism ed.by Amnon Goldworth (Oxford: Clarendon Press, 1983), 250-251.
[155] Schofield, *Political Thought of Jeremy Bentham* (see n. 153, p. 180), 75-76.
[156] Ibid, 125.
[157] Ibid, 49.
[158] Ibid.
[159] Ibid, 51-57.

Formalism as a valuable good, but not as a universal human good

According to Tamanaha, when the rule of law is approached as one of formal legality, it is a "supremely valuable good" but not necessarily a universal human good.[160] Tamanaha's view is that rules, which are the embodiment of formal legality, should not be thought to dominate in all circumstances.[161] While formal legality might be good in addressing legal limits on government and security of transactions, it is "counter-productive in situations that require discretion, judgment, compromise or context-specific adjustments."[162] This is an important issue for Commonwealth Caribbean legal systems to consider, as contemplating the limits of discretion in determining the scope of compromise or context-specific adjustments in the judicial decision-making process might conflict with judicial perceptions of being bounded by a tradition of formal legality. Yet again, this conflict can be attributed to a largely unrevised historical progression of a formalistic-viewed rule of law from the moment of its transplanted origin, particularly in relation to claims for religious, cultural or other collective or individual rights either based on the belief that the right ought to exist, or because that right actually exists in another jurisdiction, or within the international human rights system. The risk of this type of formalism which has arguably become somewhat of a norm because of a continued ideologically entrenched, uniform approach in following its methods, is the legal system generating counter-productive outcomes in the sense that its methods threaten the spatial existence of communitarianism and traditional and other localized or syncretic systems which have developed within its own realms. As such, Tamahana states:

> Often orientations other than formal legality will be less disruptive of existing relationships and social bonds. Strict adherence to the dictates of formal legality can be alienating and destructive when it clashes with surrounding social understandings,

[160] Tamanaha, *On the Rule of Law* (see n. 105, p. 169), 139.
[161] Ibid.
[162] Ibid, 140.

> particularly when there are strongly shared communitarian values and when everyone expects justice to be done. An emphasis on formal legality potentially creates particular difficulties in situations where a substantial bulk of the law and legal institutions is transplanted from elsewhere, as is common in post-colonial societies, for the reason that the legal norms and institutions may clash with local norms and institutions.[163]

In a slight departure from Tamanaha's analogy, what is interesting about the Commonwealth Caribbean is that the local norms and institutions prior to colonialism would have been limited to those of the indigenous peoples of the region. However, as previously discussed, a multicultural environment became a product of the colonial experience. Hence, what the region faced was a fusion of varying belief systems from different societies now establishing a presence in the region, but subject to a unified legal system which was primarily based on colonial perspectives of the rule of law and certain precepts of Anglo-Christian values prevalent at the time.

Substantive Equality

According to the Supreme Court of Canada in *Withler v Canada (Attorney General)*[164]*:*

> Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or

[163] Ibid.
[164] *Withler v Canada (Attorney General)* [2011] SCC 12, (2011) 1 SCR 396.

> it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.[165]

Substantive equality recognises that laws may appear to be non-discriminatory but may not address the specific needs of certain groups of people. In certain instances they might actually be indirectly discriminatory by creating systemic discrimination.[166] McCrudden states that substantive equality is furthered through the securing of basic social protections - "A vital way in which equality guarantees are underpinned is by ensuring that basic social protections for the most vulnerable are secured, such as housing, food, and education. To the extent that such protections are provided to all, substantive equality will be furthered."[167] Similarly, Fredman has argued that social rights might provide "a better route to substantive equality".[168]

A main objection to formal equality when contrasted with substantive equality is that it has the capacity to disallow measures which are actually designed to promote equality. Accordingly, Wesson states:

> For instance, by insisting that individuals should always be treated alike, regardless of attributes such as race and sex, a formal approach appears to preclude positive action in the form of, for instance, affirmative action. Policies such as these recognise that disadvantage frequently tracks characteristics such as race and therefore takes these into account rather than ignoring them completely. What formal equality fails to recognise is that it is only in certain contexts that such characteristics are irrelevant and detrimental. Substantive equality, in contrast, takes account of the position of the individual in society and the impact that the measure is likely to have upon her. In particular, government action that entrenches pre-existing disadvantage is unlikely to be upheld, whereas measures that promote disadvantaged groups are likely to be

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[165] Ibid, [39].
[166] Jérémie Gilbert and David Keane, 'Equality versus fraternity? Rethinking France and its minorities', *International Journal of Constitutional Affairs*, 14:4 (2016), 883-905, (pp. 886-893).
[167] Christopher McCrudden, 'Equality and Non-Discrimination' in David Feldman (ed.), *English Public Law*, (Oxford: Oxford University Press, 2004), 588.
[168] Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide', *South African Journal on Human Rights*, 21 (2005), 163-190, (p.180).

> endorsed. Unlike formal equality, substantive equality therefore authorises, although it does not require, positive action. ….A key feature of substantive equality is therefore its commitment to bettering the position of worse-off sectors of society.[169]

Fredman presents a four-dimensional conception of substantive equality, which postulates that an equal society will ensure equality in each of the four dimensions for all people.[170] First, under the *redistribution dimension,* the cycle of economic disadvantage suffered by members of out-groups will have been broken, so that no groups are systematically excluded from material wealth.[171] Secondly, under the *recognition dimension,* all people will receive equal recognition of their dignity and worth.[172] Thirdly, under the *transformative dimension,* society's institutions will have been adapted to facilitate diversity so that members of different groups are accommodated rather than required to assimilate to dominant norms.[173] Fourthly, under the *participative dimension,* society will have developed to the point where members of all groups will have the capacity to participate fully in society, both socially and politically.[174]

An effective system of substantive equality would need a mechanism which legitimizes policy making powers of judges and enables it to withstand any inclination of arriving at outcomes which are influenced by personal views. It ideally ought to be characterized by judicial methodology which prevents the transposing of value judgments into the decision making process.

Substantive Equality by building on 'first order' norms

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[169] Murray Wesson, 'Equality and Social Rights: An Exploration in Light of the South African Constitution', *Public Law* (2007), 748-769, (p. 751).
[170] Sandra Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2011), 25-33.
[171] Ibid, 26.
[172] Ibid, 28.
[173] Ibid, 30.
[174] Ibid, 31

Essentially a legal claim needs to be backed by a legal right, and that legal right invokes a normative framework which supports the protection of the right. Bhamra suggests a normative framework which accommodates the specificities of diversity should be constructed on a platform built on first order norms.[175] She refers to first order norms as those which form part of 'official law' such as legislation or case law. Bhamra states:

> For example, a claim under anti-discrimination legislation appeals to the normative priority of a society of equals, whilst a freedom of religion claim is grounded upon the idea, inter alia, of liberal individual autonomy and the open choice of each individual's conception of the good life. It is assumed that these first order norms are largely already settled in their content....I believe the first order norms in case law can be found in the landmark judgments of the upper courts. By this I mean those judgments that have become strong precedents and which capture or clarify the spirit behind official law in that particular area. I do not mean to suggest that the *ratio decidendi* of such a case represents first order norms; rather, that such judgments move from these first order norms in order to reach their factually specific conclusions.[176]

What Bhamra suggests is that 'official law' promises three main first order norms which can be constructed as a response to diversity, although conceding that they do not necessarily constitute an actual normative foundation of the response. The first norm is that official law promises equality[177], a feature which is present in Commonwealth Caribbean Constitutions. Bulkan in his article, *the Poverty of Equality Jurisprudence in the Commonwealth Caribbean*[178] discusses the regional constitutional outlook on this protected characteristic of equality in writing:

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[175] Meena K. Bhamra, The Challenges of Justice in Diverse Societies: Constitutionalism and Pluralism (Burlington: Ashgate, 2011), 101.
[176] Ibid, 100.
[177] Ibid, 101.
[178] Arif Bulkan, 'The Poverty of Equality Jurisprudence in the Commonwealth Caribbean', *The Equal Rights Review*, 10 (2013), 11-32.

> Almost all the constitutions of countries making up the Commonwealth Caribbean commence with some introductory commitment to the principle of equality, even if only by implication. The preamble to the Constitution of Antigua and Barbuda, for example, captures this ideal through its acknowledgement of respect for "the dignity and worth of the human person" and the entitlement of "all persons" to fundamental rights and freedoms. It then goes on to espouse the commitment that "there should be opportunity for advancement on the basis of recognition of merit, ability and integrity". These or similar aspirations are echoed in the preambles of all of the other constitutions, with some even expressing respect for equality in more direct and forceful language. The "newer" constitutions of Belize and Guyana are the best examples of this directness, with robust declarations in their preambles that speak to "equal and inalienable rights", the "elimination of economic and social privilege", and policies which ensure gender equality.[179]

Although the right to equality is classed as a constitutionally protected right, Bulkan argues that when the substantive enacting provisions of the regional constitutions are examined, there is actually a lack of reference to equality.[180] Bulkan sees this as an inadequate way of legislating for equality, and accordingly writes:

> All but one of the five earliest independence constitutions contain no general right to equality, and guarantee instead protection against discrimination on certain specified grounds. The "newer" models tentatively changed this, but even these confined any mention of the term "equality" to their preambles. Like the "older" model of constitutions, what was actually guaranteed in the bills of rights was simply protection against discrimination on certain specified grounds. Thus of all the territories, it was initially only in the unconventional Trinidad and Tobago bill of rights that a general guarantee of equality was included within the substantive provisions – this being the right of the individual to equality before the law and "equality of treatment from any public authority". Since then, however, more general guarantees of equality have been included in the constitutions of Belize, Guyana and Jamaica. The significance of this

[179] Ibid, 12.
[180] Ibid.

> feature is that in the majority of Caribbean constitutions, equal treatment is only guaranteed in the negative (as in protection from discrimination) and then only on very restricted bases.[181]

In considering this first order norm of equality which formal law promises, Bulkan's narrative alludes to Bhamra's suggestion that the assurance of equality by official law is in effect only a promise and that its fluidity is restricted by its inability to on its own function and respond as a normative foundation.

Bhamra goes on to discuss a second first order norm, which is that norm promised by the response of official law to diversity in identifying the merit and value of religion, culture and ethnicity – "Official law implicitly suggests that these aspects of our identity add value to our lives and should therefore be treated as Rawlsian primary goods."[182] In a Commonwealth Caribbean context however, the cases previously discussed have indicated that measures specifically aimed towards protecting diversity and minority groups appear to generally be absent from the legal system. On this point, Antoine comments:

> Thus, while the societies of the region may be termed 'pluralistic', they are not generally recognised as containing clearly identifiable minorities. Groups which can be identified in the society and, to a limited extent, under the law, include religious and ethnic groups such as the Muslims and Hindus. These groups have a strong presence in Trinidad and Tobago and Guyana. Two other religious-social groups are worthy of mention. These are the Rastafarians and the Shango Baptists or Orisha followers. The other identifiable grouping is the indigenous peoples, often called Amerindians, the original peoples of the region…These plural groups are not, however, given any or adequate recognition by the law and legal systems, even where they form significant groups in the society.[183]

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[181] Ibid.
[182] Bhamra, *Constitutionalism and Pluralism* (see n. 175, p. 186), 101.
[183] Antoine, *Law and Legal Systems* (see n. 10, p. 149), 7.

Based on the aforementioned, the argument exists that despite the value of those primary goods associated with diversity being theoretically recognised by the state as a first order norm, the legal culture of the region is not one which has sought to actively facilitate the promotion and protection of equality and diversity.

The final first order norm according to Bhamra is that relating to nation-building strategies which seek to encourage national cohesion.[184] Bhamra suggests that in a traditional sense such strategies aim to invoke commonalities and homogeneity with the intended outcome being to promote solidarity amongst citizens.[185] The difficulty however is that "plurality and the one-ness attributed to a loyal citizenry seem antithetical to each other."[186] The Commonwealth Caribbean region ought to be mindful that attempts to promote commonalities and homogeneity should not be at the expense of marginalizing the cultural, economic and social beliefs of citizens. Gilbert and Keane discuss this notion of equality versus fraternity in the context of France, where its Constitutional Court interprets the principle of equality as a rejection of minority rights.[187] They suggest that 'fraternity' could actually be interpreted in a sense of enabling a pathway towards minority recognition.[188] However, they allude to an invisible nature of discrimination within French society which has been created by an approach of protection from discrimination based on the individual right to equality instead of racial, ethnic, religious or linguistic group belonging.[189] The result of this approach is that measures aimed against discrimination focus on socio-economic criteria instead of racial, ethnic or religious identity.[190] Accordingly, this means that "only the individual equal citizen is protected against discrimination, not the group"[191] thereby rendering "discrimination

[184] Bhamra, *Constitutionalism and Pluralism* (see n. 175, p. 186), 103.
[185] Ibid.
[186] Ibid, 107.
[187] Gilbert and Keane, *Rethinking France and its minorities* (see n. 166, p. 184), 885.
[188] Ibid, 898-904.
[189] Ibid, 892.
[190] Ibid.
[191] Ibid.

faced by minorities specifically due to racial, ethnic, or religious affiliation, to the extent that this is discernible, invisible."[192] Gilbert and Keane suggest that a desired approach might be akin to that of the Indian constitutional method which seeks to enable 'fraternity' as being linked to 'liberty' and 'equality' which would allow for the purpose of democracy to be achieved.[193] In the Indian context, this constitutional approach sought to address caste-based discrimination, and accordingly Gilbert and Keane in recognising that in "India, inequity crystalizes around divisions on the basis of caste" state that "India emphasizes that fraternity should be a term of constitutional significance to respond to deep inequalities that undermine the social and democratic order."[194] In a sense, it is arguable that enabling the concept of fraternity within a constitutional context gives rise to claims for substantive equality.

Conclusion

A most challenging area of how law operates within the society is developing the legal system to a point of configuration which enables the discovery of axiomatic safeguards to facilitate a seamless interaction among concepts such as religion, culture, identity and the overarching state power. The realization of such a configuration might conceptually propose that all groups within the society hold an unwavering claim to constitutional recognition and protection of their beliefs and values. Idealistically this suggests that each individual would be guaranteed the protection of the law in terms of their personal or collective construct of fundamental rights and freedoms which speak to their belief system. Such a configuration also conceptually suggests a conflict-free society, but there is also the likelihood of groups competing with each other to secure

[192] Ibid.
[193] Ibid, 902-903.
[194] Ibid, 903.

legal guarantee of those rights and freedoms which they are pursuing. It is suggested that the Commonwealth Caribbean considers a re-configuration of its legal approaches geared towards managing diversity and equality. There is the need to build on first order norms established through precedents which protect individualism, and to consider how the rule of law can be crafted to be more dynamic in terms of providing protected legal spaces for a fluid operation of more localized, group-specific human rights based on determinants such as practical knowledge, tradition and belief systems. Any such change would however mean a radical departure from the orthodox understandings of the conventions underpinning the Westminster framed constitutions and legal systems of the Commonwealth Caribbean.

CHAPTER V

POST-COLONIAL CERTAINTY: REVISITING THE PAST TO ENSURE A COMMON FUTURE

Introduction

The consequences of colonialism and the residual effects of colonial power have weighed heavily against the development of local and regional rule of law in the Commonwealth Caribbean. An important element to support this development arises from the need to confront the epistemic effects of the colonial process and consider historical injustices which are still at the heart of the dominant economic system and social order. It is suggested that the starting point of this process involves revisiting the past in order to comprehensively grasp the interplay between discursive formations which emerged from the colonial period and those persons who are involved in discursive resistance through their participation in informal systems not recognized by 'hard' law. This chapter argues that revisiting the past would enable access to a certain degree of post-colonial certainty, which is necessary to ensure the development of a specific regional rule of law. It will be discussed that revisiting the past enables the consideration of the socio-legal impact of colonisation on present day Commonwealth Caribbean society. Another aspect of revisiting the past to bring about post-colonial certainty involves the case for reparations for slavery, which will also be considered. The chapter will conclude by considering the idea of re-examining what it means to be sovereign in the context of utilizing access to local knowledge, and suggest that the rule of law should be built around local knowledge.

1. Revisiting the Past: An exploration of the socio-legal impact of colonisation

A recurring theme throughout this thesis is the suggestion of placing events in a historical context to determine how to resolve disconnects in 'hard' and 'soft' law. An issue of importance arising from this context is whether there is sense in continuing to largely maintain congruity with Anglo-centred inherited legal and governance structures. As discussed in previous chapters, the outcomes of maintaining congruity have produced outcomes which tend to conflict with the belief systems of varying Commonwealth Caribbean cultures. In terms of the evolution of the legal system therefore, progression should lend itself to a shift from its Anglo-based foundation, and possibly altogether abandoning it in pursuit of a more collective regionalist structure amongst the Commonwealth Caribbean territories. Although this requires a level of regional contribution going beyond nationalistic agendas of individual states, one united factors is embedded in the communal legal colonial legacy. Each individual state's contribution to this regional structure would embody a form of civic nationalism in terms of societal inclusiveness instead of nationalism based on superiority. The post-independence Commonwealth Caribbean has had to struggle with a one-sided ambivalent relationship between itself and its former metropolitan. This is often evident for instance in varied public opinion regarding enforcement of the death penalty which is essentially a legacy of colonial rule. So too, the mixed sentiments of entirely abandoning judicial recourse to the Judicial Committee of the Privy Council reflects this one-sided ambivalence as the issue of trust in the region's own judicial institutions is weighed against the ability to obtain legal guidance from an institution which contentiously still has bearing on the region's rule of law development. The point is that a sense of confusion rears itself when it comes to the region's own understanding of how historical ties should be severed, and to what extent. This sentiment of ambivalence may actually be better

understood and resolved through reciprocity in understanding the pre-independence ambivalence by the metropolitan.

According to Antoine, the historical dimensions of colonial law "continue to be reborn in the legal decision making and institutions of the region."[1] She attributes the process of colonisation as akin to a huge tidal wave which has covered the land and submerged the natural lives of the people.[2] She goes on to state, "Whether we are discussing precedent, custom, the Constitution, or the wider society at large, for which law must function, the underlying notions of dependency and inequity are still present in many areas."[3] Interestingly, Antoine further speaks of a lingering psychological impact arising from the Commonwealth Caribbean states being "brutal slave societies" which encourage "feelings of insecurity and even self-hate in our societies and legal systems today."[4] In many ways, Antoine's arguments largely speak out against discursive formations whose resonance can be found in the rhetoric of colonialism, the effects of which she describes by saying:

> Another relic of our historical architecture is that the law is accused of being alien. This is perhaps because it is identified with the elite and imperial oppression. Our ex-slave society may thus be described as apathetic in its attitude to law, as a result of the enduring alienation that Caribbean peoples, the governed, feel with those who govern. There is a sense of disconnect, a feeling that we do not and cannot control our own destiny and that our voices are not heard.[5]

Perceptions of discursive formations as a legacy of colonialism was of course not a phenomena confined to the Commonwealth Caribbean, but instead something which echoed across those geographic areas which were held under the British Empire.

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[1] Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (New York: Routledge-Cavendish, 2008), 25.
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] Ibid.

Anthropologist and historian Bernard Cohn for instance examined the political implications of what he considered to be a colonial sociology of knowledge by demonstrating how legal codes and institutions, land tenure and revenue arrangements as well as colonial governance were fundamental to Britain's conquest and rule of India. Cohn states:

> The orientalists and the missionaries were polar opposites in their assessment of Indian culture and society but were in accord as to what the central principles and institutions of the society were. They agreed that it was a society in which religious ideas and practices underlay all social structure; they agreed in the primacy of the Brahman as the maintainer of the sacred tradition, through his control of the knowledge of the sacred texts. . . . There was little attempt on the part of either to fit the facts of political organization, land tenure, the actual functioning of the legal system or the commercial structure into their picture of the society derived from the texts.[6]

A similar process was in place in the Commonwealth Caribbean, and there is presently the need for a contemporary analysis of the colonial development of the rule of law. Assuming that the process of decolonization has not yet been completed, a possible avenue towards postcolonial transformation could be not only through an analysis of the postcolonial, but also by examining the plight of those people who are in discursive resistance through their struggles for those rights and freedoms which are yet to achieve a constitutional construct or which fall outside the scope of the legal system. A process of discursive resistance would therefore mean that the individual would need to discover adequate warranty to narrate and in a sense obtain permission to narrate. Such permission to narrate would in a way be heavily influenced by the willingness of the legal system to accommodate departure from its discursive norms shaped by Anglo-derived traditions.

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[6] Bernard S. Cohn, An Anthropologist among the Historians and Other Essays (Delhi: Oxford University
Press, 1987), 146.

From this basis it should follow that there ought to be found some sort of value in revisiting the past in order to, in a sense, self-determine. The difficulty however is the problem of obstacles leading to the actual discovery of certain truths as brought about by distortions in understanding the congruity between tradition and truth discovery. This concept will further be considered in the next section.

2. Certainty and the Rule of Law

For the Commonwealth Caribbean to not only understand, but actualize and consolidate the constituents of its regional traditions as a vehicle for moulding a native identity in its jurisprudence, socio-political and even geo-political identity, there is the necessity to separate itself from claims which lack warranty and prevent access to the domain of truths. On this point, Feyerabend explains:

> Statements composed of concepts lacking in details could be used to build new kinds of stories, soon to be called proofs, whose truth "followed from" their inner structure and needed no support from traditional authorities. The discovery was interpreted as showing that knowledge could be detached from traditions and made "objective".[7]

One such way to re-examine historical narratives which have shaped social administration is through looking at the characteristics of the rule of law in its present form and determine whether the region has been holding on to its formalistic, instrumental aspects, as opposed to using the rule of law as an evaluative tool to shape institutional reform and empower local communities to influence how rules relating to economic, social and cultural rights are crafted.

Questions of how effective post-colonial transitions have been in terms of moving towards achieving post-colonial certainty need to be looked at if there is to be any conviction that the Commonwealth Caribbean region's development is not encumbered

[7] Paul Feyerabend, *Farewell to Reason* (London: Verso, 1987), 56.

by an invariant process of decolonization. Encompassed in the course of realizing certainty in terms of the region's legal, social and political arrangements would be the exploration of how operational was the transition of power from the *'hegemonic'* to the *'subaltern.'* According to Gramsci, the subaltern classes "by definition, are not unified and cannot unite until they are able to become a State."[8] To say that the process of decolonization is slow, and its outcomes uncertain would in a sense unfairly undermine those efforts made to establish good governance and secure individual and collective rights and freedoms within the region. However, despite whatever positive developments have been achieved, the underlying actuality is that the structures which have been institutionalized to oversee social administration neither show profound signs of discontinuity nor uniqueness in its evolution from the colonial tradition. This is not to say that the underlying objective should be absolute discontinuity, as coming to terms with certain aspects of continuity would suggest a maturity of the state to learn from the experiences of the former colonizer from the perspective of having a foundation which 'mimics' that of the hegemonic norm.

In order for the regional legal systems to lay claim to a space that allows it to foster a unique identity, a process of truth discovery is necessary, as this would lead to a point which enables the realization of absolute certainty. Knowledge of the absolute truth, and by extension, the achievement of certainty would require establishing a basis of warranty that can be relied on, should one be required to defend a claim of certainty. At present however, there appears to be some disconnect between what might be embraced or perceived as a position of truth in the absence of warranty, as opposed to the ability to rely on some form of warranty which is already established. It is this Hegelian approach which dictates the necessity for the region to re-visit the historical narrative and enable a

[8] Antonio Gramsci, *Selections from the Prison Notebooks* trans. and eds. by Quintin Hoare and Geoffrey Nowell Smith (New York: International Publishers, 1971), 52.

process of discovery by turning to not only how the legal system is constituted but also how systems of governance and production work, and their interconnections. According to Flay:

> ...if one is to offer a systematic account of the ultimate nature of reality - and this was Hegel's main task - then one must first show one's indubitable right to make truth claims of an ultimate sort or, in more traditional terms, one must first show that one has access to that domain in which such ultimate truths are found. The problem is to establish warranty for one's certainty of access, rather than merely professing such certainty.[9]

An important aspect of re-visiting the colonial process in order to arrive at a stage of certainty therefore is confronting the separation of two elemental questions. These are the question of justifying the right to make and defend claims of access to an ultimate truth, as separated from the question of articulating and defending the truth. Previous chapters looking at issues such as the operation of the Westminster system, and how the legal framework within the region is progressing in relation to guaranteeing certain rights, particularly in the areas of family law, land rights and cultural rights suggest that our legal framework needs to conceptualize what constitutes adequate warranty to make claims to, and defend the 'truth.' This process should not be seen as an afterthought of legislative and judicial reasoning, but instead as a foundation which goes to the root of enabling certain rights and freedoms which may have been silenced as a consequence of forced narratives that have shaped how certain truths are perceived and defended, albeit without discovering substantial warranty.

A suggested method to initiate discovery is to ask questions about what is, and then follow this up by asking questions about what ought to be. Are we still experiencing residual effects of a rule of law previously rooted in authoritarian colonial culture? Is the

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[9] Joseph C. Flay, *Hegel's Quest for Certainty* (New York: SUNY Press), 1.

legal framework's progression encumbered by politically driven legislatures which are more reactionary, and less proactive? Do our Westminster moulded constitutions genuinely afford binary congruity between the safeguarding of fundamental rights and freedoms and the functioning of state authority? Essentially, the objective should be to ensure that our existing normative is not driven by irrational beliefs as this poses a danger to realizing true freedom, and by extension certainty of truth. The importance of this ought not to be downplayed, especially in the context of empowering individuals to experience freedom through which social utility could be positively influenced. Chomsky for instance believes that human beings function at their best in conditions which provide maximum freedom, and should therefore have the opportunity to experience that freedom.[10] There should be freedom from authority in the field of ideas and freedom of expression is to be defended, and production is established through free association.[11] Paramount to freedom actualization through escaping irrationality is the enabling of creativity by virtue of access to knowledge obtained from a standpoint from which claims to the truth could be warranted. This standpoint encapsulates Hegel's absolute idealism as "the standpoint from which we can, with already demonstrated warranty, articulate the truth about ultimate reality."[12] Knowledge acquired from this perspective of rationality would be able to shape the rule of law to guarantee inclusiveness, and rights-based approaches to problem solving. The importance of knowledge is described by Feyerabend, who writes that it is "a local commodity designed to satisfy local needs and to solve local problems; it can be changed from the outside, but only after extended consultations that include the opinions of all concerned parties."[13] The deconstructing of 'knowledge' from a historical perspective within the Commonwealth Caribbean however

[10] Noam Chomsky, *Radical Priorities* (Montreal: Black Rose Books, 1981), 246.
[11] Ibid.
[12] Flay, *Hegel's Quest for Certainty* (see n. 9, p. 198), 1.
[13] Paul Feyerabend, *Farewell to Reason* (London: Verso, 1987), 28.

brings with it the unfortunate, and unavoidable encounter of re-visiting a colonial past which involved the practice of colonial historical violence as part of the legal and economic process.

3. Confronting historical injustices through a process of reparations

Generally, "reparations" are defined as "payment[s] justified on backward-looking grounds of corrective justice, rather than forward looking grounds such as the deterrence of future wrongdoings."[14] In addition to accountability, an argument for reparations exists in terms of social transformation. Following the emancipation of enslaved persons in 1833, Britain raised the present day equivalent of 17 billion Pounds Sterling in compensation money which paid to 46,000 of Britain's slave-owners for loss of human property.[15] The socio-political and economic legacies of slavery and its abolition have been well documented in a database complied by University College London, entitled "Legacies of British Slave-ownership."[16] In pure economic terms, Great Britain was built on the basis of slavery and colonialism, with conservative estimates indicating that between 10% and 20 % of current Gross Domestic Product (GDP) can be linked to slave labour.[17]

The issue of restitution gained noticeable momentum upon CARICOM agreeing to establish a Reparations Commission in July 2013, with the commission given a mandate to establish a moral, ethical and legal case for payments by former European colonizers to the states and people of CARICOM for "native genocide, the transatlantic

[14] Eric Posner and Adrian Vermeule, 'Reparations for Slavery and Other Historical Injustices', *Columbia Law Review*, 103 (2003), 689-748, (p. 691).
[15] David Olosuga, 'The history of British slave ownership has been buried: now its scale can be revealed', *The Guardian* (London, 12 July 2015).
[15] Ibid.
[16] University College London, 'Legacies of British Slave Ownership Database', (2015).
[17] Kehinde Andrews, 'It's Britain that needs to 'move on' over slavery - away from the myths', *The Guardian* (London, 1 October 2015).

slave trade and a racialized system of chattel slavery."[18] Affirming the argument that the societies within the region have been built upon the transatlantic slave trade and chattel slavery which have been declared by the United Nations as Crimes Against Humanity (CAH), the committee has advocated the view that these societies "are uniquely placed to advance the global cause of truth, justice, and reconciliation, within the context of reparatory justice for the victims and their descendants who continue to suffer harm as a consequence of these crimes."[19]

The work of the Reparations Commission is ground breaking in the sense that through CARICOM, it has made an official statement on the region's position that its various states have collectively agreed that slavery is to be blamed for many socio-economic problems which currently plague the islands. Although not focusing on how the development of the rule of law might have been shaped as a result of colonial rule, the commission aptly outlined ten negative aspects of the present condition of Caribbean society which it attributes wholeheartedly to human rights violations associated with slavery. The importance of these aspects as outlined by the commission is that it has strengthened the ideology that not enough weight was given to achieving justice in light of the transition, and as a consequence there remains the need to confront questions of restorative justice and reconciliation. A summary of the ten areas outlined by the Reparation Commission are:[20]

(i) A full formal apology, as opposed to 'statements of regrets' which have been issued by some governments. In addressing 'statements of regrets' the plan explains that such statements "do not acknowledge that crimes have been committed and represent a refusal to take responsibility for such crimes"[21] and

[18] CARICOM Secretariat, CARICOM Reparations Commission Press Statement (10 December 2013).
[19] Ibid.
[20] Leigh Day Law Firm, CARICOM nations unanimously approve 10 point plan for slavery reparations (11 March 11 2014).
[21] Ibid.

furthermore are "a reprehensible response to the call for apology in that they suggest that victims and their descendants are not worthy of an apology."[22];

(ii) repatriation, pointing out the legal right of the descendants of more than 10 million Africans, who were stolen from their homes and forcefully transported to the Caribbean as the enslaved chattel and property, to return to their homeland;

(iii) An Indigenous Peoples Development Programme;

(iv) Cultural Institutions through which the stories of victims and their descendants can be told;

(v) Attention to be paid to the "Public Health Crisis" in the Caribbean. On this point, the plan contends that the Caribbean has the "highest incidence of chronic diseases which stems from the nutritional experience, emotional brutality and overall stress profiles associated with slavery, genocide and apartheid"[23];

(vi) Eradicating illiteracy, as the plan contends that following the period of European colonialism, "in most parts of the Caribbean, the British in particular left the black and indigenous communities in a general state of illiteracy." According to the plan, some "70 percent of blacks in British colonies were functionally illiterate in the 1960s when nation states began to appear."[24];

(vii) an African Knowledge Programme to educate people of African descent about their roots;

(viii) Psychological Rehabilitation, with the plan stating that "For over 400 years Africans and their descendants were classified in law as non-human, chattel, property, and real estate. They were denied recognition as members of the human family by laws derived from the parliaments and palaces of Europe. This history

[22] Ibid.
[23] Ibid.
[24] Ibid.

has inflicted massive psychological trauma upon African descendant populations.";

(ix) Technology Transfer for greater access to the world's science and technology culture;

(x) And debt cancellation to address the adverse financial position that faces Caribbean governments in the aftermath of slavery and colonialism in terms of its public debt and being faced with 'fiscal entrapment.' The plan states that these governments "still daily engage in the business of cleaning up the colonial mess in order to prepare for development."[25]

What the work of the Reparations Commission demonstrates is that the memory of slavery is not far removed from certain aspects of Commonwealth Caribbean society. As Beckles explains, "some persons living in the Caribbean today had grandparents and great- grandparents who were enslaved. Families continue to live with the memory of slavery and to experience life as the victims of slavery."[26] Brennan puts forward the case that the movement towards a claim for reparations is building momentum:

> It is argued that what we are witnessing is a global movement on reparations. These may be seen as peaceful and sporadic, that have different kinds of leaders and that involve West Indian governments, individuals, NGOs and members of civil society who work organically.[27]

However, he goes on to highlight the fact that the mainstream media has been slow to bring the work of reparation activists to the forefront despite the development of a global movement calling for reparations. Accordingly, Brennan states:

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[25] Ibid.

[26] Hilary Beckles, *Britain's Black Debt* (Kingston: University of the West Indies Press, 2013), 169.

[27] Fernne Brennan, *Race Rights Reparations: Institutional Racism and the* Law (New York: Routledge 2017), 196-197

> An example of an individual pushing the reparations movement can be seen in the address delivered by Professor Sir Hilary Beckles of the CARICOM Commission, House of Commons, Parliament of Great Britain, Committee Room 14 on Thursday16 July 2014. Here he presented an argument on reparations. There was no report in the general media about this even though Beckles represents CARICOM in the matter of reparations and discussed the global movement for reparations. The importance of this speech should not be ignored because, according to Beckles, it dealt with Britain wanting to shield itself from a past not just of the horrors of slavery, but racial apartheid and the colonial mess left behind for the West Indian governments to clear up.[28]

Nonetheless, calls for restitution for historical injustice in the context of the slave trade had previously gained support from various facets of the international community. At the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban in 2001, the then United Nations Special Rapporteur on Torture, Theo Van Boven raised the question of reparations in connection with the slave trade during the 16th to 19th centuries and suggested in his final report that as a moral duty affirmative action be adopted as well as "an accurate record of the history of slavery, including an account of the acts and the activities of the perpetrators and their accomplices and of the sufferings of the victims....through the media, in history books and in educational materials."[29] Prior to this, the Regional Conference for Africa held in Dakar in 2001 held in preparation for the World Conference discussed in detail the issue of reparations as related to the slave trade, colonialism and apartheid. Its final report urged former colonial powers to issue an apology as a final outcome of the World Conference. The Dakar report declared that:

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[28] Ibid.
[29] UNCHR (Sub-Commission), 'Report by Special Rapporteur Mr. Theo Van Boven 1993/8' (1993) UN Doc. E/CN.4/Sub.2/1993/8, para. 24.

> States which pursued racist policies or acts of racial discrimination such as slavery and colonialism should assume their moral, economic, political and legal responsibilities within their national jurisdiction and before other appropriate international mechanisms or jurisdictions and provide adequate reparation to those communities or individuals who, individually or collectively, are victims of such racist policies or acts, regardless of when or by whom they were committed.[30]

Cunneen argues that there is an increasing acceptance internationally of the principle of reparations and that governments acknowledge and provide reparations to the victims of human rights abuses. There is growing literature which examines the significance of reparations for those suffering historical injustices as well as the links between reparations and restorative justice.[31] Cunneen also argues that reparations "have significant potential overlap with the goals of restorative justice, and have been articulated as such for example in the South African Truth and Reconciliation Commission."[32] Former United Kingdom Prime Minister David Cameron has rebuffed demands for his government to pay reparations and to apologize for the role of Great Britain in the slave trade. Reparations campaigners greeted Cameron's visit to Jamaica in September 2015 with public protest because of his non-apologetic position and it was widely reported at the time that Cameron's relatives benefitted from compensation payments made to former slave owners following the abolition of slavery.[33]

From examining CARICOM's case for reparations, which essentially is a request to revisit the past, an issue which arises is that of sentiments of ambivalence being a driving force behind a quest to materialize something akin to power, or perhaps an effort

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[30] 'Report of the Regional Conference for Africa (Dakar, 22-24 January 2001)' UN World Conference Against Racism Racial Discrimination, Xenophobia And Related Intolerance (Durban, 31 August – 8 September 2001), (27 March 2001) UN Doc A/CONF.189/PC.2/8 , para. 18.
[31] Chris Cunneen, 'Understanding Restorative Justice though the lens of Critical Criminology' in Chris Cunneen and Thalia Anthony (eds.), *The Critical Criminology Companion* (Sydney: Hawkins Press, 2008), 290-300, (p. 300).
[32] Ibid.
[33] Joanna Plucinska, 'U.K. Prime Minister David Cameron Dismisses Jamaican Demands for Slavery Reparations',*Time* (1 October 2015).

to take control of a situation where certain aspects of societal development are existing in a historical vacuum. This 'power' in a sense would be restorative if its intent is focused on solidifying ownership and utility of the region's development while being unencumbered by lingering legacies of the colonial. The reparations process would confront these prolonged legacies, and provide an epistemic basis for the region to achieve a paradigm which lends more legitimacy towards how normative rules are shaped in terms of rights based approaches. This, of course, would herald a shift from an existing framework which is weighed heavily by its Anglo-derived influence during the transition from the colonial to the post-independence period. A desirable outcome of a reparations process would be a change in the developmental narrative that would depart from hegemonic discourse which would have influenced the individual's existential reality through processes such as religious conversions, how the education system was set up during colonialism, and how the legal and political systems were moulded. Of course, such objectives could also be achieved independent of a reparations process, with a suggested alternative avenue being a shift in focus towards 'local knowledge' which would enable decision makers to understand what are the local situations that need to be addressed and how this can be translated in the realm of public policy and the legal system.

In terms of individual self-determination, some authors have argued that slave societies and by extension individual identities would have been shaped by the colonial experience. According to Lovejoy:

> Where one was born, and most especially on which side of the Atlantic, was a crucial feature of slavery. Whether an individual slave had been born into slavery or had been retained in a society and culture as a slave had an influence on status, identity and cultural autonomy. Those who had gained some familiarity with the culture and

> society of their masters acquired a recognizable status distinct from a newly bought slave, whether in western Africa or the Americas.[34]

An alternative view offered by Mintz and Price highlights the agency of slaves in being able to establish an identity while operating within oppressive conditions brought about by slavery. According to Mintz and Price:

> The Africans who reached the New World did not compose, at the outset, groups. In fact, in most cases, it might even be more accurate to view them as crowds, and very heterogeneous crowds at that. Without diminishing the probable importance of some core of common values, and the occurrence of situations where a number of slaves of common origin might indeed have been aggregated, the fact is that these were not communities of people at first, and they could only become communities by processes of cultural change. What the slaves undeniably shared at the outset was their enslavement; all – or nearly all – else had to be created by them.[35]

Similarly, Brathwaite writes of a concept of 'creolization' as taken to mean a cultural process which identified those individuals who were slaves and of African origin as having a distinct and separate culture which was in opposition to the dominant culture of Anglo and European origin. According to Brathwaite:

> Within the dehumanizing institution of slavery….were two cultures of people, having to adapt themselves to a new environment and to each other. The friction created by this confrontation was cruel, but it was also creative. The white plantations and social institutions….reflect one aspect of this. The slaves' adaptation of their African culture to a new world reflects another.[36]

In a sense, this hints at a form of discursive resistance if it were that individuals within slave societies attempted to shape their own identities irrespective of colonial

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[34] Paul Lovejoy, 'Identifying Enslaved Africans in the African Diaspora', in Paul E. Lovejoy (ed.) *Identity in the Shadow of Slavery* (London: Continuum, 2000), 14.
[35] Sidney Mintz and Richard Price, The Birth of African-American Culture: An Anthropological Perspective (Boston: Beacon Press, 1992), 18.
[36] Kamau Braithwaite, *The Development of Creole Society in Jamaica 1770–1820* (Oxford: Oxford University Press, 1971), 306.

interference. The difficulty however with discovering utility brought about by indications of cultural formation and agency by those individuals is that the legal system presiding over the social structure was highly fragmented based on class differences. According to Clarke:

> The social structure was thus composed of three legal estates….whites with full civil rights, black slaves with virtually no rights in law – and fewer in practice, and an interstitial group of coloured people, of various phenotypes ranging from light brown to black, who were not slaves, but had only limited civil rights – they could neither hold public office nor vote.[37]

With this historical dimension in mind, there is a strong claim by governments and policy makers within the Commonwealth Caribbean that residual effects of this class stratification still persist in the present-day environment, and that one way to address this and other legacies of colonial rule is through a process of reparations. In addition to the legacies of slavery which the region continues to grapple with, so too there exists economic and social legacies of the Westminster system which need to be deconstructed.

4. Economic and Social legacies of the Westminster modelled System

Following their independence, the Commonwealth Caribbean states would have naturally been in a transition phase and in a situation of making governance decisions as guided by the Westminster modelled system and the pre-existing colonial laws which had carried over. At this point, there would also be naturally the emergence of issues such as the extent of interplay between nationalism, capitalism and socialist ideologies existing alongside the Westminster modelled framework.

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[37] Colin Clarke, 'Religion and Ethnicity as Differentiating Factors in the Social Structure of the Caribbean', *MMG Working Paper 13-06* (Göttingen: Max Planck Institute for the Study of Religious and Ethnic Diversity, 2013), 16.

It can be argued that the Westminster ideals of separation of powers and the election of governments by the population are adequate safeguards to limit the abuse of state authority and promote democratic fairness. However, the socio-economic ideology surrounding a state's arrangement according to such ideals have often been brought into question, particularly in relation to how comprehensive are constitutional approaches towards addressing its social objectives.

The prevailing governance system contained within the Westminster framed post-independence constitutions deeply reflected Locke's liberalism in its separation of powers between the legislature, the executive and in the consensual nature of civil society whose majority vote would go towards establishing a government which would be able to provide legislation on their behalf. The exceptionally legalistic liberalism under Locke, as captured in his observation that "Where-ever law ends, tyranny begins…"[38] would have also been captured by the Westminster system. Part of this would be the subjection by the rule of law to the will of another, as Locke explains that "freedom of men under government is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man...."[39]

Locke attached much significance to the right of property, and in his Second Treatise he writes, "The great and chief end, therefore, of men's uniting into common wealths, and putting themselves under government, is the preservation of their property."[40] According to Tamanaha, although Locke broadly used the term property to include life and liberty that individuals owned themselves, he primarily viewed property in the sense of possessions, with Locke's state essentially being a society of property

[38] John Locke, *Second Treatise of Government* (Indianapolis: Hackett, 1980), 103 (s. 202).
[39] Ibid, 17 (s. 23).
[40] Ibid, 66 (s. 124).

owners.[41] A substantial problem however with a governance system broadly reflecting Lockean ideals is the connection between Locke's views of equality as it related to property and civil society. According to Strauss on Locke's views on social equality:

> Equality, he thought, is incompatible with civil society. The equality of all men in regard to the right of self-preservation does not obliterate completely the special right of the more reasonable men. On the contrary, the exercise of that special right is conducive to the self-preservation and happiness of all. Above all, since self-preservation and happiness require property, so much so that the end of civil society can be said to be the preservation of property, the protection of the propertied members of society against the demands of the indigent – or the protection of the industrious and rational against the lazy and quarrelsome – is essential to public happiness or the common good.[42]

Locke's model did not directly promote the protection of individual rights and the majority consent for legislation would essentially be the consent of property holders, which "was a sufficient safeguard of the rights of each, because he assumed that all who had the right to be consulted were agreed on one concept of the public good, ultimately the maximization of the nation's wealth..."[43] Accordingly, Tamanha views Locke's liberalism as a bourgeois political theory, with his doctrine of property being directly intelligible today if it is taken as the classic doctrine of the spirit of capitalism.[44] In this sense, the boundaries of certainty in terms of man's relationship with property as it extends to individual rights should be considered together with what would be the constitutional objectives of the newly independent Commonwealth Caribbean states at the time. This brings to the forefront issues such as what ideology would the government pursue, and what shape the rule of law would assume to confront questions of political

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[41] Brian Tamanaha, *On The Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 50.
[42] Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1965), 234.
[43] Ibid, 257.
[44] Tamanaha, *On The Rule of Law* (see n. 41, p. 210), 51.

arrangement, economics and social organization. In terms of political arrangement, this was to be dictated by the Westminster framed constitutions, in the traditions of the governance patterns of the former metropolitan. From this arrangement would also stem how the socio-economic aspects of the rule of law would be shaped as it relates to the consideration of property, and its influence on individual and collective certainty.

From this notion, the Westminster propagated rule of law was rooted in a concept which sought preservation of bourgeois interests. Of this, Adam Smith commented:

> Laws and government may be considered in this and indeed in every case as a combination of the rich to oppress the poor, and to preserve to themselves the inequality of the goods which would otherwise be soon destroyed by the attacks of the poor, who if not hindered by the government would soon reduce others to an equality with themselves by open violence.[45]

Montesquieu offered an interesting perspective that English culture and society complemented the liberal legal system in terms of operating within a system driven by economic interests, by stating that "The central feature of the English way of life, and a chief purpose of its constitution, is the free pursuit of commerce."[46] By Montesquieu's views, the English were too busily engaged in enterprise to use governmental structures to oppress others, though they would recognize the opportunity to promote legislation which would further their own economic interest.[47] Accordingly, Tamanha observes, "This is bourgeois culture. In almost every relevant respect this society was contrary to the classical ideal of a society oriented toward virtue and the community."[48]

Where there is an absence of a constitutional approach geared towards social equality in the treatment of property, what this does according to Marx and Engels, is to

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[45] Adam Smith, *Lectures on Jurisprudence* (Oxford: Clarendon Press 1978), 208.
[46] Thomas Pangle, Montesquieu's Philosophy of Liberalism: A Commentary on the Spirit of the Laws (Chicago: University of Chicago Press, 1989), 198.
[47] Ibid, 148.
[48] Tamanaha, *On The Rule of Law* (see n. 41, p. 210), 53.

actually enable class antagonisms operating in favour of bourgeois property interests. Marx accused the liberal state's construction of its rule of law as enabling a jurisprudence which was the will of the bourgeois class "made into a law for all."[49] Furthermore, according to Engels:

> As the state arose from the need to keep class antagonisms in check, but also arose in the thick of the fight between the classes, it is normally the state of the most powerful, economically ruling class, which by its means becomes also the politically ruling class, and so acquires new means of holding down and exploiting the oppressed class.[50]

Conceptualizing the rule of law in terms of a model of law and society which is built around a market economy that promotes class antagonisms raises serious questions about its appropriateness and adaptability. Within this context it would be helpful to contrast a formalistic, functionalist perspective of the rule of law against a Hegelian dialectical backdrop to not only prove disconnects between the Westminster framed rule of law comprehensively addressing social equality, but also to show that going beyond formalism could lead to greater objectivity and enable access to a realm of comparable, if not greater logic.

Escaping Formalism

Essentially, the rule of law dictates that all individuals are subject to the legal system and all individual subjects are equal before the law. Therefore all Commonwealth Caribbean citizens are in principle granted equal capacity in terms of being the holders of rights as well as being subject to legal consequences depending on the nature of their actions. The individual, being a holder of rights, is therefore privy to some degree of

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[49] Karl Marx and Friedrich Engels, *The Communist Manifesto* (Oxford: Oxford University Press, 1998),. 21

[50] Friedrich Engels, *The Origins of the Family, Private Property and the State* (New York: International Publishers, 1942), 156-157.

protection in the event that there is an absence of guarantee in relation to the enjoyment of these rights. Arising from this concept is a connection between the rule of law and its administrative purpose through legislative action. This is explained by Zolo:

> Thanks to the general nature of any legislative act, subjective situations falling within a given abstract legal figure are treated alike, namely in the light of the same normative principles and according to the same rules. Hence, the legal consequences of legally equivalent actions are the same.[51]

The rule of law thus revolves around the constitutional commitment of acknowledging and granting rights which are the normative entitlements of those citizens subject to the constitution. According to Zolo:

> Going beyond notable differences in terms of philosophical reasoning and modes of legal protection – natural law doctrines versus legal positivism, universalism versus particularism, constitutional rigidity versus constitutional flexibility, and judicial review of legislation versus the absolute primacy of legislative power – different experiences of the rule of law are characterized by the constitutional commitment to guarantee individual rights, granting their holders the power to claim them on a judicial level, even against the state's organs.[52]

Linked to equality before the law is another characteristic of the rule of law, which is that it is meant to embody certainty of the law. Under the rule of law, the state commits itself to guarantee all citizens the possibility to, in principle, anticipate the legal consequences of both their behaviour and that of other members of society who they encounter. Therefore, all citizens must be provided with cognitive means which would allow them to anticipate the types of decisions affecting them which may be taken in the future by the state's authority. From this perspective, the 'certainty of law' is a widespread social good, which is meant to strengthen individual expectations and reduce social

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[51] Danilo Zolo, 'The Rule of Law: A Critical Reappraisal', in Pietro Costa and Danilo Zolo (eds.) *The Rule of Law History, Theory and Criticism* (Dordrecht: Springer Netherlands), 23.
[52] Ibid, 25.

uncertainty. This process enables the state and its legal system to perform a 'reduction of complexity' so that any uncertainty of citizens in relation to the risk of the social environment is allayed.[53] The expected outcome is "a more stable, ordered and functionally economical social interaction."[54] Accordingly, Zolo writes:

> The specific contribution of the certainty of law – this reducing citizens' insecurity towards legal risks – is the possibility for all citizens to confidently take care of their own business and to claim their rights, with good chances of success, with respect to both their social partners and political authorities. In order for the certainty of law to be implemented, citizens must above all be given the opportunity to know the law in force. They must not be doomed to *ignorantia legis* (ignorance of the law) as a result of the impossibility of knowing in advance and of interpreting with relative certainty the rules concerning them and applied by administrative authorities. Hence, laws must not be secret, and normative propositions must be clearly formulated and must not give rise to possible antinomies. Moreover, laws must not have a retroactive effect, especially in criminal matters, where the *nullum crimen sine lege* (no crime without law) principle must be upheld. Furthermore, since even the most absolute certainty of law may be frustrated by an arbitrary jurisdiction, the principle of the "natural judge" (a judge predetermined by law) must be upheld and, connected with such principle, ad hoc courts must be prohibited.[55]

In terms of maintaining social stability therefore, certainty of law involves legislative power disassociating itself from causing normative instability, which may occur through redundant legislation, parliaments and governments altering the regulation of cases either frequently or unforeseeably in instances where they are not bound by strict constitutional provisions. However, Zolo goes on to explain further that equal capacity through the rule of law does not necessarily mean that the rule of law equalizes citizens on the determinate of given factual or finalistic standards, and therefore there is a

[53] Ibid, 24.
[54] Ibid.
[55] Ibid.

challenge of achieving 'substantial equality' even though 'legal equality' may be achieved through the rule of law framework. Zolo distinguishes between 'substantial equality' and 'legal equality' by stating:

> Legal equality is not to be mistaken either for 'substantial equality' (in Western countries, such a generic expression mostly stands for some kind of equalization of economic and social conditions), or for the effective and equal enjoyment of the rights individuals formally hold. In fact, each individual is able to enjoy the same rights (freedom of speech, teaching, press, association, economic initiative, etc.) in different ways and scopes, and it is only with respect to his actual entitlement to such rights that he is treated equally with respect to other holders of rights. In many legal (not only factual) respects, property-owners are indeed different from the property-less, employees are different from self-employed workers, minors are different from adults, citizens are different from foreigners, and previous offenders are different from citizens without criminal records.[56]

Furthermore, quite interestingly, not all governmental measures may operate within the scope of the rule of law. This is evidently the case when it comes to the interference of government in the economy and may amount to an arbitrary exercise of power. According to Hayek:

> We must now turn to the kinds of governmental measures which the rule of law excludes in principle because they cannot be achieved by merely enforcing general rules but, of necessity, involve arbitrary discrimination between persons. The most important among them are decisions as to who is to be allowed to provide different services or commodities, at what prices or in what quantities—in other words, measures designed to control the access to different trades and occupations, the terms of sale, and the amounts to be produced or sold….There are several reasons why all direct control of prices by government is irreconcilable with a functioning free system, whether the government actually fixes prices or merely lays down rules by which the permissible prices are to be determined. In the first place, it is impossible to fix prices

[56] Ibid, 23.

> according to long-term rules which will effectively guide production. Appropriate prices depend on circumstances which are constantly changing and must be continually adjusted to them. On the other hand, prices which are not fixed outright but determined by some rule (such as that they must be in a certain relation to cost) will not be the same for all sellers and, for this reason, will prevent the market from functioning. A still more important consideration is that, with prices different from those that would form on a free market, demand and supply will not be equal, and if the price control is to be effective, some method must be found for deciding who is to be allowed to buy or sell. This would necessarily be discretionary and must consist of *ad hoc* decisions that discriminate between persons on essentially arbitrary grounds.[57]

In addition to the operation of an economic system arguably outside the functioning of the rule of law in terms of guaranteeing certain rights, is the legal system's struggle for capacity to address social subsystems as a result of the rule of law by its nature being slow to adapt to the evolution of the social climate. Zolo explains by stating:

> The process of differentiation of social subsystems compels the legal system to react to their rapid development by increasingly producing more specialized and particular provisions. Yet, law is a rigid and slow structure compared with the evolutionary flexibility of subsystems such as, in particular, the scientific-technologic and economic ones, which are endowed with a notable capacity of rapidly self-programming and self-correcting. This brings about "law inflation", which entails normative devaluation, redundancy and instability and, ultimately, law's regulative inability. Not only is the number of legislative acts multiplied but their texts are also increasingly muddy and far too long, more and more loaded with technological expressions and cross references to other normative texts. The fragmentary nature of norms, the reference to "emergency situations", the inclination to "programme" rather than regulate, worsen the tendency of a state's legislation to lose the requirement of generality and abstractness, and to become more and more similar to administrative acts.[58]

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[57] Friedrich Hayek, *The Constitution of Liberty* (London: Routledge, 2006), 199-201.
[58] Zolo , *The Rule of Law* (see n. 51, p. 213), 44.

By this analogy, the effect on citizens is that the application of formal equality through the rule of law may actually produce normative discriminations towards them, even though those citizens would be operating within legally equivalent, factual conditions. Therefore the legal system assumes that there are economic and social inequalities which the rule of law is not expected to reduce or altogether eliminate. By this rationale, in considering the epistemological nature of the rule of law, it is arguably more rational to build the rule of law by directing more emphasis towards its evaluative characteristics, and not the formalistic. Kaufmann for instance believed it essential to move away from an *abstract system of forms* towards a *material order of contents* and to move away from *formal apriorism*.[59] Kaufman's intention was to understand the real relationships (*Dingbegriffe*) behind conceptual relations (*Relationsbegriffe*).[60] According to Kaufmann, it was necessary to go beyond the system's formal and procedural levels in order to discover its objective traits which ought to give direction to the choices of judges and legislators.[61] Kauffman explained that constraints on public power ought not to be merely formal, but instead need to be grounded on a material order which can determine the latter's conditions "in a content-based manner".[62]

Kaufmann's concept of *'institute'* was advocated as a measure to overcome a purely normative analysis of the rule of law. The institute goes beyond being that of a set of norms, but instead a concept which came to life by its own principles, particularly in terms of being an expression of an objective order and a collection of logics "which judges, ordinary legislators, and the constituent assembly were bound to respect."[63] Under a formalistic approach however, limits and cross-checks would be destined to give way

[59] Ibid, 117.
[60] Ibid.
[61] Ibid.
[62] Ibid.
[63] Ibid.

to an inevitable arbitrariness of a given will.[64] However, in a situation where normative limits were transcended, there emerged "principles, values, and forms of collective life *('institutes')* that offered individuals the ultimate and indefeasible guarantee" against the absolutism of power, which formalism was unable to offer.[65] The institute was therefore a substantial limit to the arbitrariness of power.[66] This concept was not solely the creation of Kaufmann but was the outcome of the German historicist and organicistic tradition, and was connected with a concept of institution explored by Maurice Hauriou in the late nineteenth century.[67] According to Hauriou, the legal order should be established within a context of social interaction where groups within the society were able to operate and develop.[68] The word 'institution' in this context therefore meant any organized social group: "a group both demanding and protective towards its members, characterized by a given internal distribution of power and capable of lasting over time. It is within the institution's social and legal ambit that the rules which determine the individual members' duties and prerogatives are established."[69] The institution and not the state, was regarded as the original legal phenomenon where the state acknowledges a rich and diverse network of institutions that affects its historical development and still exists in situations where the state is operating at a point of utility.[70] Hauriou's reasoning is dualistic in the sense that the legal order is captured by a duality between 'state' and 'nation' and the nation does not simply exist because it is a component of the state, but instead it is a historical reality, visible and operating as an organized social body with a collection of established situations capable of uniting to counterbalance the government, and possessing an autonomous, legal substance. Accordingly, such parameters should define

[64] Ibid.
[65] Ibid.
[66] Ibid.
[67] Ibid.
[68] Ibid.
[69] Ibid, 119.
[70] Ibid.

the rule of law instead of it being static on the basis of an ideology of self-limitation espoused by a belief in state's absolute authority, amounting to a kind of monism where one is unable to view anything beyond the state's ambit From this, it can be gathered that individual rights should not be regarded as autonomous, absolute grants by the state, but instead derived from a societal institutional framework which would inform social and normative structures.

By this reasoning, there is compelling grounds to claim that the historical narratives and formalistic approaches which shaped the rule of law in the Commonwealth Caribbean could be revised through an evaluative approach seeking to empower groups to generate the logic that would drive legal and administrative structures akin to Kaufmann's 'institutes.' It is suggested that local knowledge can serve an important role in this process

Discovering the Commonwealth Caribbean 'self' - Social benefits of local knowledge in revisiting sovereignty

Local knowledge has been defined as "that publicly accessible knowledge of resource use, the access to which is limited to certain associations of people."[71] Access to local knowledge however does not need to be limited to small numbers of people, despite there actually being limited access to local knowledge. Barnett analogizes this concept to a football match:

> Although access to local knowledge is limited, it need not be limited to small numbers of people: 65,000 people can watch the same football game and have local knowledge of the game in progress. Millions more can obtain local knowledge of the game in progress while watching it on television. It may seem odd to describe such widely shared knowledge as "local," but such knowledge is local in the sense that the billions

[71] Randy Barnett, *The Structure of Liberty - Justice and the Rule of Law* (New York: Oxford University Press, 1998), 33.

> of persons who are not watching the game in person or on television will not have knowledge of the game in progress, just as I have no knowledge of whatever games are at this moment being played before audiences in countless arenas throughout the world. In addition to having personal knowledge that I could not possibly have (for example, how much each is enjoying the contest), these audiences have local knowledge of a public event that I might in principle be able to know, but to which in practice I still lack access.[72]

The concern here is that understanding of local knowledge remains abstract unless there is recourse to access. Concerning the rule of law, it is important that the values propagated by it are not expressed without access to local knowledge, but instead are relevant to the spatial social, cultural and political life of the nation. The contrary gives rise to the criticism of a rule of law being the product of rule by bureaucracy, which is essentially law dominated and absent of considerations to local circumstances. If this is the case, then can we in actuality regard ourselves as being sovereign? Girvan contends that the Commonwealth Caribbean experience as a product of colonization gave way to a type of post-independence nationalism which still harboured sentiments of inferiority. According to Girvan:

> Colonial education exalted the 'civilising' force and devalued the 'native'; whether people, culture or knowledge. Individual success required assimilation of the culture and values of the colonizer. The local elites that succeeded colonial rulers, while nationalist in outlook, confronted a formidable legacy in the form of a psychology and culture of local inferiority that imbues the education system and the educated classes.[73]

Here, Girvan raises an important issue of what does it mean to be sovereign within a post-colonial climate. A suggested retort is that the extraction of local knowledge to

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[72] Ibid.
[73] Norman Girvan, *Power Imbalances and Development Knowledge* (Ottawa: North-South Institute, 2007), 24.

feed into institutional reform is arguably a component of what it means to be sovereign. According to Girvan, sovereignty is that which begins in the mind, with its meaning being the capacity of a society and its citizens to be able to think for themselves. With regard to this idea of sovereignty, Girvan goes on to state:

> We have been accustomed to conflate this notion with the possession of certain constitutional and juridical attributes by the nation-state. I see the need to begin a conversation about reconceptualising sovereignty in broader terms – terms such as 'policy space' as employed in the recent discourse in the United Nations Conference on Trade and Development (UNCTAD), the South Centre and other parts of the Global South. Terms such as the development of structures of people empowerment at the local and community levels. Food sovereignty. Energy independence. The endogenous capacity to manage and adapt to climate change. The capacity to secure your borders and your people. The ability to speak knowledgeably and convincingly in global fora; and to be taken seriously.[74]

In terms of empowering local voices, Girvan's sovereignty speaks to Athenian-type democracies which he believes would be better suited to the societies of the small island Commonwealth Caribbean states.[75] The role of regionalism in this process would be to design frameworks which would enhance individual state sovereignty and assist states in meeting their national objectives. Simultaneous to this is the concept of 'shared sovereignty' at the regional level which basically means the sharing of "selected attributes of constitutional sovereignty with regional partners so as to enhance the substantive sovereignty of each"[76] particularly in areas such as national and regional security, food security, climate change and negotiations with external donors. These ideas of regionalism which encompass shared sovereignty and national sovereignty built around

[74] Norman Girvan, 'Assessing Westminster in the Caribbean: then and now', *Commonwealth & Comparative Politics* 53:1 (2015), 95-107, (p. 104).
[75] Ibid, 105.
[76] Ibid.

a model of participatory democracy conflates against the working of the Westminster system. Girvan elaborates:

> Here again, there is the issue of form vs. substance. We are searching for a theory and practice of Caribbean democracy that break free from the shackles of Westminsterism. We need forms of political participation that privilege informed citizen engagement with the urgent issues of survival and with the kind of society that we wish to create. Forms that promote the building of social consensus across the cleavages of class, colour, ethnicity, gender, and political tribe.[77]

Girvan goes on to highlight the view that the struggle for people participation in the democratic process continues to be a hallmark of Commonwealth Caribbean society, despite the Westminster system not being built to accommodate ideals such as local knowledge and community based participation. A historical synapse is elaborated by Girvan:

> The Caribbean labour movements of the 1930s, 1940s, and 1950s were a place where important debates on the future of Caribbean society took place. The preparation of the People's Plan in Jamaica in 1977 was a remarkable exercise in popular participation. The first national conference of Community Councils in Jamaica, held in the late 1970s, showed the real possibilities for developing community-based organs of people power. The Grenadian Revolution gave rise to an exciting experience in community participation in the preparation of the national budget of the Government. The Caribbean women's movements of the 1980s and 1990s have had a visible impact on national policy; and still do. All over the region, civil society activism is on the rise, campaigning for accountability and transparency in government, for constitutional reform, for responsible environmental stewardship.[78]

It is arguable whether these people-centred participatory movements within the Commonwealth Caribbean have been borne out of an anti-Westminster struggle, but there

[77] Ibid.
[78] Ibid.

is enough to indicate that a process driven by people-centred participation would be a viable alternative towards attaining institutional reform. Girvan refers to the Latin American experience in this area as one which would be able to inform the Commonwealth Caribbean and possibly bring about reform and changes in how sovereignty is perceived:

> Over in Latin America, exciting experiments in participatory democracy are taking place. Venezuela, Bolivia, and Ecuador have convened citizens' assemblies which have drawn up and approved new constitutions establishing organs of popular power, the rights of women, indigenous minorities, Afro-descendants, and social and economic rights including the right of women to be remunerated for unpaid household labour. There is no shortage of experiences from which we can draw.[79]

In addition to the importance people participation in driving a sovereign system, there is also the issue of the role of local knowledge in re-visiting approaches to rationalization in decision making. Geertz for instance asks the question of whether 'jural rules' are actually effective in constraining behaviours or whether they merely serve as masks for rationalizations "for what some judge, lawyer, litigant or other machinator wants to do anyway."[80] In illustrating institutionalized law as distinguished from a rule of law administered through local systems, Geertz gives an example of varying processes of rationalization in classical Islamic and Indic law whose procedures although dissimilar were based on concepts seeking to rationalize certain behaviours against the backdrops of their perception of universal truths. He contrasts this type of rationalization with a rule of law which determines the fairness of justice by embodying legal realism, and states that the law should not be regarded as "a collection of ingenious devices to avoid disputes, advance interests, and adjust trouble-cases."[81] Geertz also advocates what he calls a legal

[79] Ibid.
[80] Clifford Geertz, Local Knowledge: Further Essays in Interpretive Anthropology (London: Fontana Press, 1983), 169.
[81] Ibid, 175.

sensibility or a determinate sense of justice which targets a polarization between facts and law. He states:

> Put it this way, the question of law and fact changes its form from one having to do with how to get them together to one having to do with how to tell them apart, and the Western view of the matter, that there are rules that sort right from wrong, a phenomenon called proof, appears as only one mode of accomplishing this.[82]

Interestingly, Geertz makes the claim that law *is* local knowledge, and that its conclusions should therefore relate to the management of differences, and not to the abolition of it.[83]

It is suggested that crafting a rule of law which is built around local knowledge and native social needs as opposed to disposing various groups within the society into a system which subjects them to monistic sets of rules would be more suited to accommodating differences in identities and belief systems. In a sense, local knowledge may be regarded as something which transcends normative legal rules. Accordingly, it is also arguable that social actors function through various forms of local knowledge through which resonate types of practical knowledge that go beyond normative legal concepts. This would actually be ideal where the intention is an adaptable rule of law whose applicability is adjustable and able to recognize variations in any given factual situation. The challenge is that while some aspects of local knowledge might remain relatively constant, knowledge in itself is somewhat spatial and subject to the evolution of conceptual understandings. A framework to capture this type of dynamism possibly goes against the instrumental rationalities displayed by normative understandings of the law.

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[82] Ibid.
[83] Ibid, 218.

Conclusion

In conclusion, it is suggested that the Commonwealth Caribbean, both at a regional and national levels revisit the idea of what it means to be sovereign, especially in relation to its historical progression, rule of law development and social arrangement. Part of this process means that the region has to think historically and determine whether there is rationality in maintaining the overarching structures of legal, political and social order. The movement towards initiating a reparations process suggests that there is consensus to discover a point of restoration. However, the region must be careful to recognize that beyond a reparations process, there also exists a responsibility to confront existing discourse and determine its value and relevance in terms of how our legal system and the society actually functions. It is also suggested that there be a shift towards a system which conceptually and practically allows the rule of law to operate as something which is dynamic, adaptable and whose logic is able to access scenarios which are informed by local knowledge. Hegel's dialectical approach has been applied to state the thesis that Westminster formalism and its version of the market economy is not appropriate in terms of relevance and adaptability. The antithesis has been considered that the rule of law in its current form attempts to justify the guarantee of certainty by means of law that is not secret, not retroactive and applied by defined authorities. In contrasting both the thesis and antithesis, a position of synthesis to solve the conflict discussed is arrived at whereby it is suggested as a solution the use of local knowledge in enabling a process of considering what it means to be sovereign and shaping the rule of law accordingly**.**

CHAPTER VI

THE CARIBBEAN COURT OF JUSTICE AS AN ACTOR IN FACILITATING DEVELOPMENT OF THE RULE OF LAW

Introduction

This Chapter will discuss the Caribbean Court of Justice (CCJ) as an actor in facilitating the development of a more regional and localized rule of law in the Commonwealth Caribbean, and its role in contributing to a framework which promotes legal certainty in the region. This is important in the context of the aim and objective of the thesis, as the issue of whether the CCJ is able to provide a measure of post-colonial 'certainty' through its jurisprudence via a framework which addresses diversity and varied belief systems. In doing so, it will discuss the background and structure of the CCJ and identify certain distinctive characteristics of the court. It will also consider the perspective of the CCJ being a court rooted in the normative culture of the Commonwealth Caribbean as opposed to the London based Judicial Committee of the Privy Council (JCPC). In exploring the potential role of the CCJ in development of the rule of law, the chapter also examines the debates that have surrounded cases on capital punishment as an illustration of the tensions between localised norms and international law. As such, it will discuss concerns about how domestic legislation permitting the death penalty will be treated by the court in light of judicial challenges to its constitutionality, as well as conflicts with state responsibilities to the international community arising from treaty obligations. Diverging attitudes towards adoption of the CCJ and the threat of politicizing of the court will also be examined. Overall, this chapter considers whether adoption of the CCJ by CARICOM Member States is pivotal in any movement towards

attaining a regional court which embodies principles of collective autonomy and self-identity.

1. Background and Structure of CCJ

The CCJ was established by twelve states[1] in an action which sought to reinforce their independence from the United Kingdom and to provide CARICOM with a regional avenue for judicial recourse. By the *'Agreement Establishing the Caribbean Court of Justice,'*[2] in July 2003 the English-speaking Caribbean states agreed to implement recommendations from a 1992 report by the West Indian Commission[3] which called for a regional court. This commission comprised a collection of distinguished West Indian intellects, and was chaired by Sir Shridath Ramphal, a former Secretary General of the Commonwealth. Reflecting on a decision taken by CARICOM Heads of Government in 1989, the West Indian Commission advocated the necessity of a CARICOM Supreme Court. It considered that the low number of appeals at the time being heard by the Judicial Committee of the Privy Council (JCPC) was a result of a lack of access to the JCPC, for example, because of financial reasons.[4] The Commission made the case that the need for a court "with both general appellate jurisdiction and an original regional one is now overwhelming - indeed it is fundamental to the process of integration itself."[5]

Following the formal agreement to establish the CCJ, the court itself was launched in 2005, with one of its objectives being to replace the JCPC as the final Court of Appeal for Commonwealth Caribbean states, in addition to resolving disputes between the Member States comprising CARICOM. In a landmark speech by Ramphal, a case for the

[1] Antigua and Barbuda; Barbados; Belize; Dominica; Grenada; Guyana; Jamaica; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and The Grenadines; Suriname and Trinidad and Tobago.
[2] Agreement Establishing the Caribbean Court of Justice (14 February 2001).
[3] West Indian Commission, *Time for Action - The Report of the West Indian Commission* (Black Rock, Barbados:West Indian Commission, 1992).
[4] Ibid, 498-499.
[5] Ibid, 498.

CCJ was made essentially addressing the potential the court would offer for the region, while quelling the doubtful impressions of the court. On the need for a regional organ of judicial appeal, he commented:

> It is almost axiomatic that the Caribbean Community should have its own final court of appeal in all matters. I am frankly ashamed when I see the small list of Commonwealth countries that still cling to that jurisdiction - a list dominated by the Caribbean. Now that we have created our Caribbean Court of Justice in a manner that has won the respect and admiration of the common law world, it is an act of abysmal contrariety that we have withheld so substantially its appellate jurisdiction in favour of that of the Privy Council.[6]

Addressing concerns that the judges of the JCPC were more competent than the prospects among CARICOM states, he argued that the region had "sent judges to the International Court of Justice, to the International Criminal Court and to the International Court for the former Yugoslavia, to the presidency of the United Nations Tribunal on the Law of the Sea."[7] The institutional design of the court does indeed suggest a certain distinctiveness as envisioned by Ramphal and the West Indian Commission. The structure of the CCJ has certain unique characteristics in terms of its selection of judges, funding and its dual functions as a court final appeal, and an interpreter of treaties. These will now be considered.

Selection of Judges

A unique characteristic of the CCJ when compared to other international courts is the selection process for its judges. Judges are appointed by a Regional Judicial and Legal Services Commission (RJLSC)[8], while the President of the CCJ is selected by the

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[6] Sir Shridath Ramphal, 'Caribbean Judiciaries in an era of Globalization: The Paradox of Heritage and Hesitancy' (public lecture, Hyatt Regency Hotel, Port of Spain, Trinidad and Tobago, June 25, 2009).
[7] Ibid.
[8] Agreement Establishing the Caribbean Court of Justice, art V(3)

CARICOM Heads of Government.[9] The idea of the RJLSC originates from those Commonwealth Caribbean constitutions which provide for domestic Judicial and Legal Services Commissions (JLSCs). This framework is intended to protect the CCJ from political interference and influence. The RJLSC comprises the President of the CCJ, who serves as its Chairman in addition to members selected from regional law associations, academics and civil society groups.[10] Removal of judges is also controlled by the RJLSC, but is subject to defined parameters such as inability, illness and grave misbehaviour and is also done based on the advice of an independent enquiry tribunal comprising eminent jurists not necessarily confined to the region, who also hold or have held high judicial office.[11] The President of the CCJ may also be removed on the same grounds as those applied to the CCJ judges and subject to the same procedure, with a recommendation then made to the CARICOM Heads of Government.[12] At this stage, the removal would only be effective in the instance where a three quarter majority of the Heads of Government agree to it.[13] This process for the appointment and removal of CCJ judges is a departure from the traditional method for the selection of judges to international courts, which usually involves governments nominating or electing the judges. The transparency of the traditional system has recently come under intense scrutiny, with the view that there may be some judges who are appointed "as a consequence of a highly politicised system, and who are not necessarily the best candidate."[14] States who have nominated judges from their own as well as other countries for positions in international courts have also been accused of 'vote trading,' a practice whereby one state would lend its support to nominees from other states primarily on the basis of political influence instead of judicial expertise.

[9] Ibid, Art IV(6).
[10] Ibid, Art V(1) .
[11] Ibid, Art IX
[12] Ibid, Art IX (5) (1) .
[13] Ibid, Art IV (6).
[14] Afua Hirsch, 'System for appointing judges 'undermining international courts'', *The Guardian* (London, 8 September 2010).

Human rights groups such as Human Rights Watch have cautioned against this practice, having stated in a memorandum to the International Criminal Court (ICC) that vote trading over ICC positions could produce the consequence of poorly qualified judges and a bench that would not be the most skilled and representative.[15]

Funding

Another distinctive mechanism by which the CCJ has sought to protect itself from outside interference is through the system which facilitates funding of the court. Financing of the domestic judiciaries across the region is achieved through annual subventions derived from national budgets. Generally, the judiciary would provide a projected budget and forward this for cabinet approval through the Attorney General. This practice does not always encourage confidence in the idea of an independent judiciary which is free from political interference, and is an arrangement which may invoke an erosion of public trust and confidence in the administration of justice. To address this uncertainty in the context of the CCJ, a different approach was established. Funding is secured by way of the CCJ Trust Fund, which was created to finance the CCJ in perpetuity to the sum of $100 million USD.[16] The principal intention of this funding model is for the court to meet its expenditure through income generated from the fund[17]. Member states would therefore not be placed in a position to commit to periodic contributions in order to offset the operating expenses of the court. Administration of the trust fund is the responsibility of a Board of Trustees comprising persons selected from the various member states, and include distinguished financial professionals.[18]

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[15] Ibid.
[16] Leonard Birdsong, 'The Formation of the Caribbean Court of Justice: The Sunset of British Colonial Rule in the English Speaking Caribbean', *U. Miami Inter-Am. L. Rev*. 36 (2005), 197-227, (p. 211).
[17] Ibid.
[18] Ibid.

To assure the expertise of those persons who would sit on the Board, Article VI of the Revised *Agreement Establishing the Caribbean Court of Justice Trust Fund*[19] (TFA) states that the Board of Trustees shall consist of the following or their nominees: The Secretary-General of CARICOM; Vice-Chancellor of the University of the West Indies; President of the Insurance Association of the Caribbean; Chairman of the Association of Indigenous Banks of the Caribbean; President of the Caribbean Institute of Chartered Accountants; President of the Organisation of Commonwealth Caribbean Bar Associations; Chairman of the Conference of Heads of the Judiciary of Member States of the Caribbean Community; President of the Caribbean Association of Industry and Commerce; and the President of the Caribbean Congress of Labour. In terms of addressing financial transparency, some of the functions of the Board according to Article VII of the TFA include evaluating the performance of the Fund; establishing with the approval of the members guidelines for prudential investment of the resources of the Fund; establishing with the approval of the members the financial regulations of the Fund; appointing an investment manager or managers to manage the investments of the Fund in accordance with the investment guidelines for the Fund; approving the annual report on the performance of the Fund for transmission to the members; approving the capital and operating annual budget of the Fund and appointing an external auditor.

Dual Function of the CCJ

What also sets the CCJ apart from other international courts is that the CCJ exercises a dual function, by being able to assume the role of either a court with 'appellate jurisdiction,' or 'original jurisdiction.' To explain this differentiation, firstly, in its appellate jurisdiction, it is the final court of appeal for CARICOM countries in criminal, constitutional and civil matters. At present, the only countries which have ratified the appellate jurisdiction of the CCJ are Barbados and Guyana in 2005, Belize in 2010 and Dominica in 2015. Jamaica attempted to accept the appellate jurisdiction of the CCJ in 2004, but the JCPC ruled in *Independent Jamaica Council for Human Rights (1998) Ltd. & Others v Marshall-Burnett and Another*[20] that the procedure which was being adopted to do this violated the Jamaican constitution, and the process instead required a constitutional amendment. Secondly, in its original jurisdiction the court acts as the dispute settlement body for the interpretation and application of CARICOM trade rules within the *Revised Treaty of Chaguaramas*[21] (RTC). The design of the CSME as created by the RTC is for the CARICOM region to function as a single and seamless economic

[19] Revised Agreement Establishing the Caribbean Court of Justice Trust Fund (12 January 2004).
[20] Independent Jamaica Council for Human Rights (1998)Ltd & Others v Marshall-Burnett and Another [2005] UKPC 3.
[21] Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy (adopted 5 July 2001, entered into force 2 April 2002) 2259 UNTS 293 (RTC).

space which would facilitate four freedoms, namely the freedom of establishment, movement of CARICOM nationals, services and capital. The CCJ is given exclusive jurisdiction in all matters relating to the interpretation and application of the RTC.

By structuring the CCJ in this way, developing such an indigenous systematic model should be considered a noteworthy milestone for the region in its efforts to cement its ownership of the court. The formation and comparative development of each arm of this dual structure may arguably reflect the region's grappling with the progressive ideology of regional economic stability through solidifying the regional trade bloc and implementing the RTC against a "decolonization movement that has still not been completed,"[22] as demonstrated by the slow progress by some states in abandoning the JCPC. As to where the priorities of the court lie in the context of its dual function, CCJ judge Justice Jacob Wit has commented that in addition to its appellate jurisdiction, the CCJ is "also (and foremost) an International Court" and the "immediate cause for the court's existence lies in its pivotal role in building up the CARICOM Single Market and Economy."[23] In the sphere of its original jurisdiction the CCJ can be a catalyst for improving trade relations between CARICOM member states and providing a regulatory environment which would foster economic growth and development. The prospect of the region developing a body of law and judicial thought surrounding the RTC is an exciting one, and would also allow legal professionals from small island states an avenue to practice international law and by extension contribute to achieving an efficient regional single market and economy.

Yet, despite these aforementioned distinctive characteristics of the CCJ model which suggest a real effort to carve out a regional judicial institutional framework that is fit for purpose to the Commonwealth Caribbean, its adoption is still to be confirmed

[22] Jacob Wit, 'Remarks on the Caribbean Court of Justice', *American Society of International Law*, 102 (2008), 285 – 286, (p. 285).
[23] Ibid.

across the region because of the remaining option of access to the JCPC in those territories where it is still constitutionally allowed. Proponents of the CCJ have argued that the JCPC is too far removed from the Commonwealth Caribbean to understand the local conditions of the region, while its opponents have questioned the relationship between the CCJ and political institutions, with the suggestion being that the CCJ may be exposed to political pressure and public pressure brought about by political institutions. This political and public pressure is quite evident in terms of how the death penalty is regarded. The continued option of access to the JCPC in the Commonwealth Caribbean, whether it is disconnected from localized conditions and its approaches to the death penalty will now be discussed.

2. The Privy Council 'Problem' and clashes on the Death Penalty

Historically, the JCPC was established in 1833 to preside over Appeals in those matters originating from the colonies of Great Britain, which at the time included Australia, New Zealand, the English speaking African countries, the Indian subcontinent, the West Indies and parts of South America.[24] In the current climate, despite gaining independence from the former metropolitan, Commonwealth Caribbean territories have not collectively agreed on shelving recourse to the JCPC in favour of complete regional adoption of the CCJ. From a constitutional perspective, it has been argued that the use of the JCPC is hindering a process of decolonisation as the constitutional conversation is being carried out in a foreign voice, which would result in the discourse reflecting "a cluster of values, intellectual orientations and practices that carry a distinct British cast."[25]

[24] John S. Jeremie S.C., 'The Privy Council and the Caribbean', *Law Quarterly Review.* 129 (2013), 169-172, (p. 169).
[25] Simeon McIntosh, *Caribbean Constitutional Reform: Rethinking the West Indian Polity* (Kingston: The Caribbean Law Publishing Company, 2002), 294.

Further explaining this position, Sir David Simmons the Chief Justice of Barbados has stated:

> The independence of the states of the region will not be complete, is not complete, when our constitutions entrench a foreign tribunal as our final court of appeal. It is inconsistent with independence: it is an affront to our sovereignty and the sovereignty of independent nations. You may say this is an emotional argument, but these psychological considerations are important and the symbolism is not to be discounted.[26]

An often cited decision of the JCPC which is used to advance the claim of a disconnect between the JCPC and its understanding of Commonwealth Caribbean society is its decision in *Lennox Phillip and Others v DPP*[27]. This matter concerned an attempted *coup d'etat* by an Islamic revolutionary group in Trinidad and Tobago, where the Prime Minister and other Members of Parliament were held hostage, but an agreement was made between the group and the Prime Minister allowing them be pardoned for their actions if they released the hostages and brought the confrontation to an end. Following this, the state attempted to prosecute members of the group for treason, murder and various other offences which were allegedly committed during the insurrection. It was argued by the state that the pardon lacked validity as a result of the circumstances by which it was brought about. Despite the Trinidad and Tobago Court of Appeal confirming the validity of the pardon by a 2-1 majority and the JCPC agreeing with its validity, the JCPC went on to decide that the state was not in a position to prosecute members of the group as this would amount to an abuse of process.[28] This decision faced widespread criticism within Trinidad and Tobago and the Commonwealth Caribbean by the general public and jurists alike, with the JCPC having been accused of encouraging the making of deals with

[26] Ibid, 266.
[27] *Lennox Phillip and Others v DPP* [1992] 1 AC 545
[28] Ibid, 559.

insurgents. For instance, former president of the CCJ, Michael de la Bastide in considering the JCPC's ruling in *Phillip*, expressed his dissatisfaction with the judgment by stating that the JCPC's decision was neither equitable nor just considering that "114 insurrectionists today walk the streets free from prosecution for their crimes against the society and their assault on the democratic process of the nation."[29] He further implied that a final appeal court based in the Caribbean would have adopted a different approach.

While there has been an active debate in the Commonwealth Caribbean either supporting or rejecting the JCPC, the JCPC itself has never argued for maintaining its position of judicial oversight. Facing criticisms of being a colonial remnant, a foreign voice adjudicating on legal matters arising from foreign cultures and judicially legislating for the region, the JCPC has indicated that countries are entitled to remove themselves from its jurisdiction once this is done in accordance with constitutional procedure. In *Independent Jamaica Council for Human Rights (1998) Ltd & Others v Marshall-Burnett and Another*,[30] the JCPC stated:

> It must be understood that the board, sitting as the final court of appeal of Jamaica, has no interest in its own in the outcome of this appeal. The board exists in this capacity to serve the interests of the people of Jamaica. If and when the people of Jamaica judge that it no longer does so, they are fully entitled to take appropriate steps to bring its role to an end. The question is whether the steps taken in this case were, constitutionally, appropriate.[31]

Following his installation as the President of the Supreme Court of England and Wales in 2009, Lord Phillips of Worth Matravers, made several public comments to the extent that British judicial resources were being strained because of JCPC appeals originating from the Caribbean, expressing his discontentment that Britain's best judges

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[29] Michael de la Bastide, 'Case for a Caribbean Court of Appeal', *Caribbean Law Review*, 5 (1995), 401 - 431, (p. 423).
[30] *Independent Jamaica Council for Human Rights (1998) Ltd* (see n.20, p. 231).
[31] Ibid, [4].

had to be allocated to Caribbean matters. Commenting on the time spent by the Supreme Court of England and Wales on JCPC appeals, he was quoted in the *Financial Times* as saying, "It is a huge amount of time, I personally would like to see it reduced. It's disproportionate."[32] On 24 September 2009, the BBC addressed the *Financial Times* interview with Lord Phillips, and quoted a public commentator who stated that the practice of Britain's best judges being required to spend a significant amount of their time presiding over overseas appeals largely from the Caribbean on business was "of no interest to anyone in the United Kingdom" and a "minor public scandal."[33] What these comments also bring to the forefront is the financial implications to the United Kingdom in allowing the JCPC to continue. The writers of the BBC report referred to statements made by the former Governor General of St. Kitts and prominent Caribbean jurist, Sir Probyn Innis, who remarked that a demand for payment from services provided by the JCPC would "shake them (Caribbean governments) out of the denial that seems to affect us in the Caribbean."[34]

Yet, despite these concerns, the JCPC has not been entirely displaced. Geoffrey Robertson, who has represented a number of appellants in death penalty appeals from the Caribbean has described the profound sense of dislocation he experienced when appearing as counsel before the JCPC, stating:

> One side of the amphitheatre is taken up by rows of law books, the other has high windows overlooking Whitehall. The parade of black taxis and red buses passing Big Ben reminds the visitor that he or she is located precisely at the epicenter of what was once the British Empire. What is bizarre, however, is that the concentrated legal minds in this room must all imagine they are in another country … This is a court which is jurisprudentially orbiting in space, landing one day in Antigua, another in Trinidad.[35]

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[32] Michael Peel, Jane Croft, 'Privy Council hampers Supreme Court', *Financial Times* (London: 21 September 2009).
[33] [Anon.],'Privy Council's Complaint', *BBC Caribbean* (24 September. 2009) .
[34] Ibid.
[35] Geoffrey Robertson, *The Justice Game* (Vintage: London, 1999), 85.

It is in this context that the CCJ is regarded as embodying an institution which closes the circle of independence and represents the sunset of British rule[36]. It represents a parting with the region's former imperial metropolis, which is still intertwined with its rule of law, thereby being an ever present aspect of political and social life from the times of colonialism.[37] The movement towards adopting the CCJ has borne with it the notion that the JCPC is an unnecessary remnant of a colonial period where the rule of law had been tailored to protect the economic viability of a plantation economy built on slave labour and the slave trade. There is also concern over the practicability of British jurists sitting in a London court deciding on judicial matters arising from a region whose socio-economic and political dynamic bears stark resemblance. What appears to be a growing sentiment for an arguably delayed discourse on judicial self-determination ironically taking place decades after independence has led to the region slowly grappling with a change of direction in how its legislative affairs are governed. Events over the past two decades such as the public debacle of disagreements between the JCPC and particularly the governments of Jamaica and Trinidad and Tobago on approaches towards the death penalty as well as signals from the Supreme Court of England and Wales have indicated that the opportunity for the CCJ to cement its role has to be capitalized on.

The death penalty dilemma

Even before the CCJ commenced it operations, it was branded by critics as a 'hanging court' or one which was specifically being established to preserve the practice and continuity of capital punishment in the Commonwealth Caribbean.[38] The effect of this was to place the court in a position of having to not only institute its authority in the realm of administering the RTC, but also one where it needed to indicate its position on

[36] Ibid.
[37] Ibid.
[38] Birdsong, *The Formation of the Caribbean Court of Justice* (see n.16, p. 230), 203.

the death penalty in light of international human rights standards weighed against regional constitutional provisions allowing for capital punishment. The issue of the death penalty mainly dominates the discussions surrounding the CCJ from the perspective of the general public. A 2008 study conducted by the CCJ Court Protocol and Information Officer indicated that although 73 percent of the people interviewed in Trinidad and Tobago heard about the CCJ, only 22 percent knew that the court had two jurisdictions, with the majority unaware of the court's original jurisdiction.[39] Most of the respondents favouring the CCJ replacing the JCPC indicated their expectation that the CCJ would be a 'hanging court.'[40] Political messages encouraging enforcement of the death penalty has translated into widespread public opinion favouring death by hanging. The prevalence of violent crimes and gang warfare in Jamaica and Trinidad and Tobago has also greatly influenced the position of the general public, with a 2008 poll taken in Jamaica in 2008 indicating that as a consequence of crime rates, 97 percent of the population supported the death penalty.[41] Jamaica has also voted against United Nations Resolutions A/res/62/149, A/res/63/168 and A/res/65/206 which have called for a moratorium on the use of the death penalty, with a view to its abolishment.

The CCJ has attempted to void the perception that it is an institution which would find favour with the death penalty. The President of the CCJ, Sir Dennis Bryon has indicated to the Antigua Observer newspaper that, "We are a court of justice and we will be dealing with the law as it exists and the constitutional rights of our citizens as set out in our respective constitutions."[42] Sir Bryon held firm to the position that it would be the law and not politicians that would be responsible for determining the use of the death

[39] Joris Kocken and Gerda van Roozendaal , 'Constructing the Caribbean Court of Justice: How Ideas Inform Institutional Choices', *European Review of Latin American and Caribbean Studies*, 93 (2012), 95-112, (p. 105).
[40] Ibid.
[41] Ibid.
[42] 'CCJ warns politicians it won't support death penalty agendas', *The Antigua Observer* (St. John's, Antigua, 24 February 2015).

penalty by the CCJ.[43] His position was evident in the CCJ ruling of *Attorney General v Boyce*[44] where the CCJ, although stating that its role was neither to be bound by, nor ignore the jurisprudence of the JCPC, confirmed that it was tasked with re-examining JCPC precedents and outlining the approach that it would take in addressing similar issues.[45] In addressing the death penalty in *Boyce*, the court acknowledged the merits of the JCPC death penalty jurisprudence in its effort to ensure necessary procedures to afford the fundamental human rights had not been violated.[46] In light of this however, the court also acknowledged that the Constitutions of many Commonwealth Caribbean states retained capital punishment, thereby creating a dilemma as judges are not entitled to change this practice, despite whatever personal views they might hold on the death penalty.[47] What the JCPC death penalty jurisprudence had done was to create a paradoxical situation by its rulings in *Pratt and Morgan v Attorney General for Jamaica*[48] when read together with its rulings in *Neville Lewis v The Attorney General*[49] and in *Thomas v Baptiste*[50]. In *Pratt*, it was established that a delay of more than five years in carrying out the execution of a person on death row amounted to inhuman and degrading treatment. In *Lewis* and in *Baptiste*, the JCPC took the position that in the event where a state ratified a treaty which granted the convicted person the right to petition an international body, his sentence was required to be suspended until the petition was decided. Therefore, where the process of petition exceeded a period of five years, any potential execution would amount to inhuman and degrading punishment as decided in *Pratt*. In explaining this paradox, the CCJ was successfully able to dispute its label as a

[43] Ibid.
[44] *Attorney General v Boyce* [2006] CCJ 3 (AJ).
[45] Ibid, [17]-[20].
[46] Ibid, [20].
[47] Ibid.
[48] Pratt and Morgan v Attorney General for Jamaica [1993] UKPC 37, [1994] 2 AC 1.
[49] *Neville Lewis and others v The Attorney General of Jamaica and Another* [2000] UKPC 35, (2001) 2 AC 50, (2000) 57 WIR 275.
[50] *Thomas v Baptiste* [1999] UKPC 13, (2000) 2 A.C. 1.

'hanging court' while indicating the need to carve out its own jurisprudence from existing law.

The *Pratt* decision was met with a tremendous backlash, with Jamaica having to commute the sentences of 105 prisoners, Trinidad and Tobago 53 prisoners and Barbados 9 prisoners, all of whom had already been on death row for five years.[51] Local Courts of Appeal were also forced to put other matters on hold and instead focus on determining appeals within a two-year deadline, which was the timeframe stipulated in *Pratt* for domestic appeals. After the domestic appeals process was completed, *Pratt* allowed for a further eighteen months for the completion of petitions before international bodies such as the United Nations Human Rights Council (UNHRC) and the Inter-American Commission of Human Rights (IACHR). Prior to the JCPC's decision in *Pratt*, there were no instances of either the UNHRC or the IACHR completing any appeals within the eighteen-month timeframe. Practically, appeals were taking two to three times longer than eighteen months to be completed and defence lawyers soon recognised that by initiating the international human rights appeal process, it was possible that their clients would stand a chance of their sentences being commuted to life imprisonment. This situation was brought to the attention of the JCPC in *Bradshaw v Attorney General of Barbados*,[52] where representations were made by the Government of Barbados for the five-year period as outlined in *Pratt* to be extended, taking into consideration how long petitions before the IACHR and UNHRC were taking in reality to be completed. Alternatively, it was submitted that the five-year period should not take into consideration the time taken by the IACHR and UNHCR to conclude petitions. The JCPC however rejected these submissions, and suggested that the government would be in a better position if it had expedited the domestic appeals process.

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[51] Derek O'Brien, 'The Caribbean Court of Justice and Its Appellate Jurisdiction: A Difficult Birth,' *Public Law* 34 (2006), 344 - 363, (p. 361).
[52] *Bradshaw v Attorney General of Barbados* [1995] UKPC 21, [1995]1 WLR 936, PC.

It was from this background that renewed calls for adopting the CCJ were being made by local politicians, who cited interference from the JCPC in the execution of legislative functions. Sir David Simmons lambasted the position of the JCPC on the death penalty as "a naked usurpation of the legislative function under the thin guise of constitutional interpretation."[53] Former Jamaican Prime Minister, P.J. Patterson during Parliamentary debates focusing on the CCJ made his case for the CCJ by stating that the JCPC was wrongly forcing judicial legislation by virtue of their decision in *Pratt* and other death penalty cases. Speaking in the context of advocating Jamaica's adoption of the CCJ's appellate jurisdiction, Patterson stated:

> How, as an independent nation, can we countenance judicial legislation? This is not about the flexing of political muscle. It is difficult to escape the conclusion that the ruling in a line of cases beginning with *Pratt and Morgan*, in the early part of the last decade, have amounted to judicial legislation.[54]

In a sense, the regulation of the death penalty is more of an argument which ought to focus on the separation of powers between the judiciary and the legislature and what would be the agreeable way to treat with law allowing for capital punishment, balanced against the protection of human rights. Yet, the CCJ was unfairly placed in the spotlight by politicians who chose to criticize the JCPC on the grounds of perceived judicial interference in matters to be decided by the legislature. For those opposing the CCJ and it death penalty jurisprudence, the view follows that if constitutional interpretation is a means of expressing a state's constitutional identity, then the JCPC being the interpreter of the constitution would allow a former coloniser to continue to define its collective identity.

An important issue which emerges from the death penalty discourse is whether the exercise of judicial discretion by a group of judges who are physically and culturally

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[53] O'Brien, *CCJ and its Apellate Jurisdiction* (see n. 51, p. 240), 344.
[54] Ibid, 354.

removed from the Commonwealth Caribbean countries would be appropriate as they are essentially making decisions of public policy. The CCJ itself in *David Lachana A/C Lachana, Sadonel Devi Lachana v Cooblal Arjune & Tara Ajune*[55] made its claim as an autonomous, indigenous court by stating:

> Their Lordships are both geographically and culturally far removed from the countries that still retain the Privy Council as their final appellate court. They are, quite understandably, unfamiliar with local situations and customs. The difference with our Court is obvious. We are a regional Court and thus much closer to home as it were. Our closeness to the region and our greater familiarity with its social and cultural dimensions make it easier for us to descend into the facts of the case.[56]

Former Chief Justice of Trinidad and Tobago, Justice de la Bastide has argued that those who are entrusted to make decisions on the rule of law ought to have an intimate knowledge of how the society functions as they would be better informed about that society's needs, and would be subject to the highest forms of accountability as a result of being a member of that society.[57] On this basis, supporters of the CCJ have claimed that the court would "empower regional jurists to give effect to regional standards and values as the laws of the region are interpreted and applied."[58] In considering the regional climate at present, it is easy to claim that current regional standards and values would firmly establish a pro-death penalty position. However, this should not be taken to mean that the CCJ is a pro-death penalty court. What should be facilitated is an environment for the CCJ to determine what would be best for the society at the existing moment of its history, while also taking into consideration international standards on human rights norms in light of governments seeking to protect their legislative and political agendas. It is worth considering that although there was a shift in the legal norms which governed capital

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[55] David Lachana A/C Lachana, Sadonel Devi Lachana v Cooblal Arjune & Tara Ajune [2008] CCJ 12 (AJ).
[56] Ibid, [12].
[57] De La Bastide, *Case for a Caribbean Court of Appeal* (see n. 29, p. 235), 429.
[58] Ibid.

punishment following the *Pratt* decision, there was no accompanying shift in the general attitude of the public. Commonwealth Caribbean governments appear to be trapped in a situation of conflict between domestic commitments to the death penalty and international human rights commitments. Regional governments and the general public continue to favour the death penalty as the best deterrent for violent crime. According to a former Attorney General of Trinidad and Tobago, Ramesh Lawrence Maharaj, the existence of capital punishment was a necessary feature for Caribbean participation in human rights systems. According to Maharaj, it was on this basis that:

> Commonwealth Caribbean States organised their domestic legal and administrative procedures in capital cases and it was on this understanding that Trinidad and Tobago accepted the right of condemned prisoners to petition the international human rights bodies.[59]

In *Boyce*, the CCJ took the position that the JCPC decision in *Pratt* raised tremendous concern amongst the governments and members of the public in the Commonwealth Caribbean. This concern emerged as a consequence of the radical nature of the decision in *Pratt*, the apparent stringency of the time period it stipulated and the unpreparedness of the authorities to systematically cope with the consequences of the decision. According to the CCJ in *Boyce*, the *Pratt* decision disrupted national and regional justice systems – "Its effect was that, in one fell swoop, all persons on death row for longer than five years were automatically entitled to have, and had, their sentences commuted to life imprisonment."[60] The CCJ while not explicitly overruling the JCPC in *Boyce*, instead took the view that a reasonable time limit ought to be placed on the length of time for appeals to be conducted.[61] Had the CCJ completely overruled *Pratt*, the fledgling court had the potential of facing an international backlash from governments

[59] Ramesh Lawrence Maharaj, 'The Death Penalty: Legal and Constitutional Issues', *Caribbean Law Review*, 9 (1999) 137, (p. 150).
[60] *Boyce* (see n. 44, p. 239), [48].
[61] Ibid, [118].

who opposed the death penalty and international human rights organisations, and its credibility would have come under intense scrutiny.

What is troubling is that there appears to be confusion as to what is the indicative standards of human rights in the region when it comes to the rule of law and the death penalty. According to Antoine, the jurisprudence of the JCPC is swayed by international decisions, even if these conflict with local sentiments. Antoine views the JCPC decisions on the death penalty as reflecting standards emanating from the UNHRC and the European Court on Human Rights (ECHR). She states that whatever the validity of the UNHRC and ECHR decisions on capital punishment, what is in doubt is whether the JCPC made a correct assessment of West Indian societal norms on the issue instead on relying on its "own distaste for capital punishment."[62] Yet, the JCPC in *Henfield and Farrington v AG of the Bahamas*[63] commented:

> Their Lordships are conscious that the conclusion which they have reached … may cause some concern among those responsible for the administration of justice. They are very much aware of the problems in certain countries in the Caribbean which have given rise to unacceptable delays in execution, which in their turn have inevitably led to the establishment of the principle in *Pratt*.[64]

From this passage, there is clear indication by the JCPC that there are problems which it is aware of in terms of the effective administration of justice, so as to prevent undue delays in the carrying out of the death penalty. It is not unreasonable to suggest that such a situation becomes a human rights concern when justice cannot be administered in a timely manner because of localized problems in the criminal justice system, as well as uncertainty caused by conflicts in the approaches of international law, and municipal law towards the death penalty. Bascombe, who views human rights standards in the

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[62] Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems*, (New York: Routeledge-Cavendish, 2008), 318.
[63] *Henfield and Farrington v AG of the Bahamas* [1996] UKPC 4, (1996) 49 WIR 1.
[64] Ibid,[35].

Caribbean as being absent or comparatively lower than normative Western standards, argues that it is important for the CCJ to play a role in the development of "a regional system of protection of human rights that ensures that these rights are open to all."[65] However, he disagrees that the Privy Council is too far removed from the Commonwealth Caribbean to provide access to justice by contending that this would mean that human rights protection by means of the Inter American Court of Human Rights or the United Nations Commission on Human Rights is also too far removed from the region.[66] Instead he contends that from a localized level, domestic legal systems should be able to look to the CCJ to provide normative guidance on the recognition of human rights standards.[67] Accordingly, Bascombe explains:

> The law can and must be instrumental in the formation of a just and egalitarian society that embraces all....Governments in the Caribbean have a moral and constitutional duty to create societies that are socially and economically just. This would include free access to justice (as per the CCJ) as well as protection from the state. Recognising the necessity of human rights standards through the CCJ would serve to unite Caribbean people by placing their rights at the heart of the local legal system.[68]

In addition to political and public pressure derived from the death penalty issue, the CCJ has also faced the challenge of gaining the trust of the public as previously mentioned. This matter of how the CCJ should respond to pressure from political institutions and their campaigners would next be considered. It will also be discussed how the CCJ through certain key judgments have contributed to the development of the human rights jurisprudence in the region, as well as the general clarification of the rule of law in other areas.

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[65] Dominic Bascombe, 'The introduction of the Caribbean court of Justice and the likely impact on human rights standards in the Caribbean commonwealth', *Commonwealth Law Bulletin*, 31:2 (2005), 117-125, (p. 123).
[66] Ibid.
[67] Ibid.
[68] Ibid, 124.

3. The CCJ and Rule of Law Development in the face of Political pressure and Public uncertainty

A recurring feature in the political discussion on the importance of the CCJ is the issue of public trust in the institution. The issue has been raised as to whether the CCJ deserves public trust, with a lack of trust having the effect of compromising the courts legitimacy. Public trust for the CCJ has been slow to come about, with surveys in Trinidad and Tobago indicating that the majority of respondents held the quality of the JCPC in greater regard than that of the CCJ.[69] Negative public attitudes towards politicians and those in positions of governance continue to bring to the forefront a sentiment that the CCJ can be manipulated by politicians. CCJ judges have been considered as products of an untrustworthy political environment, and therefore by extension the institution of the CCJ would not hold that regard of trustworthiness. This sentiment may be compounded by the reality that just three countries have accepted the appellate jurisdiction of the CCJ, despite the court existing for a period of ten years. The CCJ has come under particular attack in Trinidad and Tobago, with a former senator Wade Mark conveying in the Senate the already existing view that the CCJ was a political tool in the hands of politicians.[70] According to Mark, the JCPC was a "buffer between the masses and a marauding band of potential oppressors, dictators and power hungry megalomaniacs."[71] Mark's views are akin to a line of thought which suggests that what the CCJ is doing is merely replacing an independent judiciary with a politically dependent one. The notion that the court would be better than the CCJ in its ability to consider regional culture, values and circumstances was also met with objection by former leader of the Jamaican opposition Edward Seaga,

[69] Kocken and van Roozendaal, *Constructing the Caribbean Court of Justice* (see n. 39, p. 238), 107.
[70] Ibid.
[71] Ibid.

who commented that this approach would mean there would be diminished consideration for universal values.[72]

The issue of conflict between the CCJ and stakeholders, such as political institutions is no doubt one which can result in adverse situations which can disrupt perceptions of the legitimacy of the court. One such example is the effect of public opinion on the court, which might be influenced by political institutions. Pressure directly from political institutions can also be brought about because of competition for institutional power.[73] **'**Political power' has been defined by Weber as the possibility of one actor in a social or political relationship to be in a position to deliver his own will against resistance, notwithstanding the basis on which the possibility rests.[74] Weber suggests that power enables the actor to have its own way, even where there is the prospect of others being opposed to the actor's decision.[75] The manner of response by the CCJ to external institutions is therefore important for protection of its institutional autonomy. Hatzopoulos considers how responsive should a court be to political institutions and suggests that there is basis for a negative response.[76] An important ground for this conclusion is founded on the doctrine of separation of powers:

> Montesquieu's *Esprit des lois* and the idea of separation of powers, today still constitutes the single most important legacy of the French Revolution to modern democracies. It is true that the radical separation envisioned by French revolutionaries has been watered down in order to accommodate the complex needs of modern states: the executive power increasingly encroaches into the legislature's domain, and occasionally also performs (quasi) judicial functions. US executive agencies offer a

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[72] Ibid.
[73] Marcus Höreth, 'The Least Dangerous Branch of European Governance? The European Court of Justice under the Checks and Balances Doctrine,' in Bruno De Witte, et al. (eds), *Judicial Activism at the European Court of Justice* (Cheltenham: Edward Elgar Pub, 2013), 45.
[74] Max Weber, *Economy and Society* eds.by Guenther Roth and Claus Wittich (California: University of California Press, 1978), 53.
[75] Ibid.
[76] Vassilis Hatzopoulos, 'Actively talking to each other: the Court and the Political Institutions,' in Bruno De Witte, et al. (eds), *Judicial Activism at the European Court of Justice* (Cheltenham: Edward Elgar Pub, 2013), 107.

> prime example of (a limited) departure from Montesquieu's ideas. European governments often dispose of extended legislative powers as does the EU Commission by virtue of the EU Treaties (in areas such as competition and state aid law) or by delegations given to it by the EU legislature (the European Parliament and the Council – although delegated powers are typically subject to strong comitology obligations). This notwithstanding, the principle of separation of powers remains the orthodoxy, especially in relation to Courts and the delivery of justice.[77]

In the context of the European Union (EU), the doctrine of separation of powers forms the EU's principle of institutional balance. This principle directs EU institutions to act within the strict confines of their competencies without impeding other institutions - "In other words, the legislature should be legislating and the Court should be judging – without interfering with one another." [78] Furthermore, responsiveness to political institutions would jeopardize the court's role in its protection of individuals from maladministration, its protection of fundamental rights and its pursuance of the integrity of its institutional and constitutional role.[79] Responsiveness to political institutions can also erode the institutional legitimacy of the court, and can open up the court to attacks of being partisan to certain Member States, or commercial entities or interest groups. Nonetheless, in discussing the EU system, Dehousse identifies four avenues by which a court can have interaction with political institutions, namely as an agenda setter; as a policy innovator; in its course of performing a legitimate function and as a catalyst for Community legislation.[80] Essentially, these avenues brings to the forefront the Court's role as an "initiator of interaction."[81]

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[77] Ibid.
[78] Ibid, 107-108.
[79] Ibid, 108.
[80] Renaud Dehousse, The European Court of Justice: the Politics of Judicial Integration (Basingstoke: MacMillan, 1998), 82–96.
[81] Hatzopoulos, *Actively talking to each other* (see n. 76, p. 247), 112.

According to Höreth, Courts actually benefit from the perception of them being politically neutral.[82] As such, he states:

> It is widely assumed that courts operate in a solely legal environment in which there is no place for politics and no place for their own political interests. As a result, the largest advantage highest or constitutional courts have *vis-à-vis* the actors of the other branches of government is their (putative) neutral nature and trustworthiness of their decisions. This is even the case with decisions that address highly salient and politically contested issues. Whenever there is a horizontal conflict between political actors of the two other branches of government, it is to be expected that the Court have no interests that coincide with those of one of the conflicting parties.[83]

Although, Höreth's reference considers the court in a domestic system, the same principle can be applied to the CCJ, and ideally domestic governments and the CCJ would want to strive for a mutually beneficial relationship. Adoption of the court should suggest that regional governments have placed enough trust and confidence in its neutrality, and consequently, the court should avoid judgments which are political in nature, as this would actually undermine its authority. What would be important is for the CCJ to follow an objective of case law coherence. Case law coherence is arguably connected to values such as fairness and integrity and allows for an unencumbered operation of the rule of law as arbitrary decision making would be avoided. This would also encourage the self-responsibility of the court. As Shuibhne states:

> Fundamentally, when the Court makes interpretative choices, it should explain and rationalize those choices - especially when it departs from the law established in its previous decisions. The converse idea of fragmentation conveys the breakdown of legal coherence. It also captures the related ruptures that occur: not only in the case law substantively but also in the underpinning values and in institutional confidence, which can in turn lead to a breakdown of institutional trust. Importantly,

[82] Höreth, *The Least Dangerous Branch of European Governance*? (see n. 73, p. 247), 47.
[83] Ibid.

> fragmentation is not about difference *per se*. Instead, it gives us a mechanism to establish when and why difference is not justifiable.[84]

Another issue that has been explored by commentators is whether the CCJ does in fact represent a unified regional identity, and whether such an identity does in fact exist. The notion of a common Caribbean identity has been dismissed by the argument that different diasporic movements have resulted in the presence of varied identities. The CSME is yet to allow the unrestricted movement of all persons within the region, and strong national identities have meant that persons moving from one island in the Caribbean to another have been met with anti-immigration responses. In 2013, thirteen Jamaicans were denied entry into Trinidad and Tobago on the same day,[85] and as recent as October 2014, three Jamaicans who were not allowed to enter Trinidad and Tobago claimed that they were forced to sleep on the airport floor and denied access to food and bathroom facilities.[86] These acts were met with anger by Jamaica, whose citizens in turn called for a boycott of Trinidadian imports. Essentially these occurrences have put the operation of the CSME under intense scrutiny, and encouraged nationalist sentiments instead of a collective regional identity.

Alternatively, the development of local jurisprudence may be more relevant to each island state than the development of a regional jurisprudence. Of course, this would mean that each national judiciary would need to undertake responsibility for its own jurisprudential development, therefore avoiding the CCJ by establishing national courts of final appeal. Although CARICOM attempts to function as a single custom union to solidify its economic well-being in a global context, the reality is that national identities vary across the region. Again it is Jamaica and Trinidad and Tobago who have mooted

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[84] Niamh Nic Shuibhne, The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice (Oxford: Oxford University Press, 2013), 32.
[85] 'Stay out! - 13 Jamaicans turned away from Trinidad', *Jamaican Observer* (Kingston: 21 November 2013)
[86] 'Mistreated in Trinidad - Jamaicans Left Hungry After Twin-Island Denies Entry', *The Jamaica Gleaner* (Kingston: 6 October 2014).

the idea of localized final courts of appeal. Within this context former Prime Minister of Trinidad and Tobago Kamla Persad-Bissessar stated that the argument for embracing the CCJ was not about justice, but that the country wanted to be a sovereign and independent nation.[87] The basis of 'sovereignty' also fuelled the views of former Jamaican Prime Minister Bruce Golding, who commenting on the possibility of a national court of final appeal replacing the JCPC, stated that he believed Jamaica had the judicial experience and maturity for this to happen. Of course, establishing such a court at this point would undermine the existence of the CCJ, and not auger well for its future operation and public confidence.[88] Accordingly Kocken and van Roozendaal state:

> Within the frame opposing the CCJ it was argued that the development of local jurisprudence is better left to the Caribbean state's own national judiciaries. This is in line with the internal notion of sovereignty and identity, which emphasizes the differences within the Caribbean. Thus the point is made that the CCJ judges do not have, cannot have, the sense of Caribbean identity needed for the development of a distinctive Caribbean jurisprudence. It has been emphasized by others that next to national identity it is global identity that counts: either the PC *(Privy Council)* should be replaced by a national final appellate court, or the PC should stay.[89]

Despite this assertion, the argument will be put forward that the CCJ has the institutional autonomy to shape regional legal norms through its decision making, and that this process is already underway. Reference will be made to certain landmark decisions to demonstrate this claim.

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[87] Kocken and van Roozendaal, *Constructing the Caribbean Court of Justice* (see n. 69, p. 246), 106.
[88] Ibid.
[89] Ibid.

4. Shaping regional norms through the Court's decision making

The CCJ is in a position to shape regional legal norms where it assumes the role as an actor vested with responsibility for the jurisprudential of the Commonwealth Caribbean. In such a role, the CCJ bears with it the institutional influence to address questions of the legal identity of the Commonwealth Caribbean. The court's construction of the law can be arguably linked to having the effect of providing a normative framework from which the region's legal identity can be affirmed. This is an enormous responsibility as the court in its decision making would be prompted to not only deconstruct national legal systems, but also to consider things such as historical influences on the rule of law, as well as diasporic and international influences.

The CCJ has attempted to invoke cultural change from its rulings which have addressed public accountability and good governance. In *Florencio Marin and Jose Coye v The Attorney General of Belize*[90], the Attorney General brought a claim for the common law tort of misfeasance in public office against two former Ministers of Government. It was alleged that during their terms in office they arranged for the transfer of fifty-six parcels of state land to a company beneficially owned and/or controlled by one of them. The Attorney General further claimed that the company paid a significant sum below market value for the land, and that the transaction was undertaken deliberately, without lawful authority and in bad faith, thereby resulting in a loss of public revenue. Traditionally, a claim in tort for misfeasance involving public officials would be extended only to private citizens or classes of persons, but the CCJ in *Marin* upheld the decision of the Belize Court of Appeal that the tort could extend to an action initiated by the Attorney General. Until *Marin*, there had never been any instance in a Commonwealth Caribbean jurisdiction where the state had attempted to use this cause of action against public

[90] Florencio Marin and Jose Coye v The Attorney General of Belize [2011] CCJ 9 (AJ).

officials abusing their powers for personal financial benefit. The CCJ found that there was no "sufficient reason to deny the logic of the developments in the tort of misfeasance in public office which have in this case converged with the evolution of the corporate nature of the State in the law of torts."[91] The CCJ's influence on the shaping of the judicial landscape also appeared evident in its statement that extending the scope of the tort "may well portend the welcome emergence of a new matrix of causes of action hitherto frozen in their historical crypts and now animated by judicial imprimatur."[92] The CCJ in *Marin* practically made available another avenue to address corruption and misuse of public resources, in addition to avenues usually used such as disciplinary action, dismissal from office, anti-corruption legislation, criminal prosecution or civil litigation for breach of trust or breach of fiduciary duties. From its decision in *Marin*, the court has made a commendable stance in how it views standards of public accountability.

Again, the CCJ in *Trinidad Cement Limited v The Competition Commission*[93], the court addressed the issue of corruption and mismanagement by public officials. In this case, the court indicated its role in upholding the rule of law as it relates to accountability in its statement that:

> By signing and ratifying the Revised Treaty and thereby conferring on this Court *ipso facto* a compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Revised Treaty, the member states transformed the erstwhile voluntary arrangements in CARICOM into a rule-based system, thus creating and accepting a regional system under the rule of law. The rule of law brings with it legal certainty and protection of the rights of states and individuals alike, but at the same time of necessity it creates legal accountability. Even if such accountability imposes some constraint upon the exercise of sovereign rights

[91] Ibid, [154].
[92] Ibid.
[93] Trinidad Cement Limited v The Competition Commission [2012] CCJ 4 (OJ).

> of states, the very acceptance of such a constraint in a treaty is in itself an act of sovereignty.[94]

The CCJ in made its first pronouncement on the law governing free movement of persons within the CSME in its landmark judgment of *Shanique Myrie v Barbados*.[95] While under colonial rule, persons residing in the British West Indies were able to move, live and work in any of the Caribbean islands, although there is indication that no legal right existed to freedom of movement as demonstrated in *Margetson v Attorney General of Antigua*[96] where the Court of Appeal of the West Indian Associated States decided that a citizen from Montserrat had no legal right to land and residence in the nearby island of Antigua. Leading to the establishment of the original *Treaty of Chaguaramas* (1973) (TC),[97] restricted movement had become an established characteristic of the post-colonial Commonwealth Caribbean. The TC provided that:

> Nothing in this Treaty shall be construed as requiring, or imposing any obligation on a Member State to grant freedom of movement to persons into its territory, whether or not such persons are nationals of other Member States of the Common Market.[98]

However, the Grand Anse Declaration and Work Programme for the Advancement of the Integration Movement (1989)[99] and the Report of the Independent West Indian Commission (1992) [100] recommended a return to the practice of free movement and focus on removing barriers to the free movement of skilled persons and professionals. The passage of the RTC in 2001 further redefined the regional integration framework, with Article 45 speaking to the objective of free movement of all Community

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[94] Ibid.
[95] *Shanique Myrie v Barbados* [2012] CCJ 3 (OJ).
[96] Margetson v Attorney General of Antigua [1968] 12 WIR 469.
[97] Treaty Establishing the Caribbean Community (adopted 4 July 1973, entered into force 1 August 1973) 946 UNTS 17 (Treaty of Chaguaramas or TC) .
[98] Ibid, art 38.
[99] Grand Anse Declaration and Work Programme for the Advancement of the Integration Movement (Conference of Heads of Government of the Caribbean Community, Grand Anse, Grenada, July 1989)..
[100] West Indian Commission, *Time for Action - The Report of the West Indian Commission* (Black Rock, Barbados:West Indian Commission, 1992).

nations and Article 46 on the free movement of skilled Community nationals. Building on the scope of Article 45, it was agreed at the CARICOM Heads of Government Conference in 2007 that all CARICOM nationals should be entitled to an automatic stay of six months upon arrival in order to enhance their sense that they belong to, and were able to move in the Caribbean Community, although being subject to the rights of Member states to refuse undesirable persons entry and to prevent persons from access to public funds.

The CCJ in *Myrie* considered the matter of a Jamaican woman, Shanique Myrie who had visited Barbados in 2011, with the purpose of spending time with friends. She was detained and interrogated by Barbadian immigration authorities, who suspected her of transporting drugs. A degrading and intimate search was conducted on her person, following which she was placed in a cell overnight and then returned to Jamaica the following day. The CCJ held that that by effect of the 2007 decision of the Conference of Heads of Government, Myrie was permitted to travel without restrictions to Barbados, despite Barbados not having enacted legislation to implement the 2007 decision. The court decided that the community treaty does not require that Member States enact a binding Community decision into domestic law in order to create at the Community level legally binding rights and obligations. Instead states would be required to give domestic effect to such a decision subject to their own relevant constitutional procedures.[101] Where these constitutional procedures require domestic legislation, then the legislature must be involved in order to give municipal courts the authority to adjudicate those rights and obligations at the municipal level.[102] The CCJ further stated that *in lieu* of enacting new or amending old legislation this objective may in certain circumstances be accomplished administratively or even judicially in cases where the Constitution or the existing

[101] *Myrie* (see n. 95, p. 254), 54.
[102] Ibid.

domestic legislation leaves room for so doing.[103] The CCJ also held that the behaviour of the Barbadian officers who detained her and then proceeded to conduct an intimate search on her while repeatedly insulting her in addition to placing her overnight in a holding cell in the airport constituted a serious violation of her human and fundamental rights. The CCJ in *Myrie* appeared to have shifted from a prior strategy of legal diplomacy to one of assertion directed at expanding the jurisdiction of the court and transforming CARICOM from a collection of sovereign states to an autonomous political community. In addressing the decision of the CCJ in *Myrie*, Justice Anderson observed that *Myrie* may well serve as a catalyst to facilitate the expansion of the RTC rules addressing freedom of movement beyond that of employment or other economic activity, and as a consequence:

> contribute to the further evolution of that nascent virtue of 'Caribbean identity' which has already taken root in the field of education through the University of the West Indies and sport via the 'exploits' of the West Indies Cricket Team.[104]

The CCJ however faces obstacles to any assertion of CARICOM law being above the law of Member States. A prime example is the Constitutions of those Member States which claim superiority over other law, and that where there is a conflict of laws, then the Constitution would prevail. Using the Constitution of Barbados as an example, Section 1 states:

> This Constitution is the supreme law of Barbados and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.[105]

Interestingly, this approach is taken by the English-speaking CARICOM Member states, and echoes the dualist common law perspective, where international and domestic law are treated as separate and independent systems of law, with each having supremacy

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[103] Ibid.
[104] Justice Winston Anderson, *Free Movement within CARICOM: Deconstructing Myrie v. Barbados*, Speech delivered to the OECS Bar Association (St. Georges: Grenada, 2013).
[105] Constitution of Barbados s 1.

in its own areas of operation. Yet, within CARICOM there exists those countries such as Suriname which prescribe to a monist doctrine, adopting the position that both domestic and community law are integrated and that where there is a conflict of laws then international law would prevail over domestic law. Another apparent obstacle is that based on Article 240 of the RTC, the RTC appears to subject itself to the decisions of national legal systems to the extent that legally binding rights and obligations would not be created until relevant constitutional procedures. This article states that decisions of competent Organs taken under this Treaty shall be subject to the relevant constitutional procedures of the Member States before creating legally binding rights and obligations for nationals of such states. However, as seen in *Myrie*, the *prima facie* subjection of Community law to national law may not directly apply where there are no contrary provisions in the Constitution or legislation.

Sitting in the capacity of its appellate jurisdiction in *Boyce*, the CCJ also held that a treaty which was ratified but unincorporated could still be able to give rise to certain legitimate expectations.[106] In *Boyce*, the CCJ stated that the principle of legitimate expectation would apply in balancing the competing interests of a person on death row to pursue a petition to the IAHRC and that of the state to refuse to await the conclusion of the IAHRC determination.[107] The *Boyce*, judgment suggests that the CCJ finds favour with the proposition of a jurisprudential shift away from dualism where the outcome is the advancement of international human rights norms. Accordingly, it was stated in *Boyce* that the proliferation of international treaties has transformed individuals into "active players on the international plane pursuant to treaties entered into by their Governments"[108] even if the treaties are yet to have basis within the domestic legal system. The court further explained:

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[106] *Boyce* (see n. 44, p. 239), [128] – [132].
[107] Ibid.
[108] Ibid, [105].

> Put in stark terms, by ratifying the treaty, the Executive has thrown to the condemned man, fighting for his life to be spared, a lifeline, albeit one that perhaps offers only a slim chance of rescue. The real issue facing judges is this: As the man is about to grasp this lifeline, is it fair for the Executive, which placed it there in the first place, to yank it away? Is it enough for the court then merely to explain to the man that unincorporated international treaties form no part of domestic law; that he has derived no 'right' from the mere accession of his Government to the treaty; that the Executive does not have to await the determination of his petition by the international body before executing him, even though the report of that body, if it were available, would have to be considered by the authority responsible for exercising the prerogative of mercy and might persuade that authority to spare his life? Those are the haunting questions that cause judges much discomfort.[109]

Aaron, in his observations on *Boyce*, suggests that the framing of the above passage of *dicta* by the CCJ "seems to suggest an underlying resentment on the part of the judges that their court was being asked to enforce dualism strictly and ignore the practical implications of doing so."[110] The CCJ *Boyce* thus made the determination that a strict application of dualism would produce an outcome which "seems oddly out of step with the modern trend of employing legal concepts for giving effect to, rather than frustrating, generally accepted notions of what is fair and humane."[111] On this point, Aaron further comments:

> That a new court, which should be predisposed to erring on the side of caution in its first major judgment, was willing to acknowledge the need for a new approach to the interpretation of unimplemented treaties, speaks to the momentum pushing courts away from the traditionalist's view of dualist theory. It is clear from the outset of their judgment that President de la Bastide and Justice Saunders wished to send the

[109] Ibid, [110].
[110] David Aaron, 'Reconsidering Dualism: The Caribbean Court of Justice and the Growing Influence of Unincorporated Treaties in Domestic Law', *The Law and Practice of International Courts and Tribunals*, 6 (2007) 233–268, (p. 257).
[111] *Boyce* (see n. 44, p. 239), [111].

> message to governments that they should not expect courts to apply dualism strictly where doing so would undermine individual rights.[112]

The indication of non-adherence to a strict dualist tradition by the CCJ arguably carries with it a proposition that domestic courts within the Commonwealth Caribbean legal system can use unincorporated treaties as interpretive aids in their construction of domestic law.[113] However, the point of contention with the suggestion of this approach by the CCJ is that the court might be exposing itself to the same criticism that it is trying to resolve by a lose construction of dualism, that is, undermining the function of the legislative arm of its member states by way of judicial activism. Indeed, the risk is that the court might be misconstrued as having the unencumbered authority to direct domestic courts based on the values which are deemed to be preferred by the CCJ. Haynes instead suggests an approach whereby the CCJ combines teleological approaches "with other legal arguments based on the wording of the instrument, legislative history, comparative law as well as legal contexts."[114]

The CCJ has also made several other important judgments during the duration of its term thus far. In *Romeo Da Costa Hall v The Queen*,[115] the court considered the human rights violation of excessive pre-trial detention. In this matter, the CCJ considered a matter where the state withdrew an indictment for murder after accepting a plea of guilty of causing serious harm with intent. The trial court took into account two of the years the prisoner spent on remand when calculating the sentence and the CCJ ruled that although a court does have discretion, the general rule is that time spent on remand should be considered, but there were certain exceptions such as where the court concluded that the

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[112] Aaron, 'Reconsidering Dualism' (see n. 110, p. 258), 257
[113] Ibid, 265
[114] Jason Haynes, 'Mapping the Path of the Teleological Approach: a Normative Analysis of the Caribbean Court of Justice's (CCJ) primary approach to treaty interpretation,' *Commonwealth Law Bulletin*, 39:3 (2013), 573-590, (p. 584)
[115] *Romeo Da Costa Hall v The Queen* [2011] CCJ 6 (AJ).

defendant deliberately attempted to expand this time, and where the entire or part of the pre-trial custody was not related to the offence that the prisoner was being sentenced for.

Addressing the jurisdiction of Guyana, which has a hybrid land law system comprising a mixture of the English common law and Roman-Dutch law, the CCJ was able to give clarity to several important doctrinal issues arising from Guyanese land law. In *Ramdass v Jairam and Others*,[116] the CCJ was able to clarify and state definitively that equitable interests in immovable property are not recognized in Guyana, and therefore cannot be acquired. In *Toolsie Persaud Ltd. v Andrew James Investments Ltd. and Others*,[117] the CCJ brought clarification to the law of adverse possession as it relates to Guyana by deciding that it was possible to acquire title to state land through adverse possession where the claimant showed a sufficient degree of physical control and custody of the land in addition to an intention to exercise this custody and control on his own behalf, and for his benefit. Furthermore, in *Lackram Bisnauth v Ramanand Shewprashad and Rajwattie Bisnauth* [118] the CCJ attempted to provide guidance on principles addressing the acquisition of prescriptive title to land under the *Guyana Title to Land (Prescription and Limitation) Act, 60:02.*

As previously discussed, the CCJ, being an exclusively new court with autonomous and final jurisdiction, is not bound to prior decisions from other courts, including authoritative courts such as the JCPC. This rule is maintained even where previous JCPC decisions originated from the same jurisdiction that a CCJ matter which is being heard originates. As mentioned, in *Boyce,* the observation was made that the CCJ will consider very carefully and respectfully the opinions of the JCPC in matters from states which still accept the Privy Council as their final court. Haynes argues that some of the CCJ's most recent decisions in its original jurisdiction capacity suggest an

[116] *Ramdass v Jairam and Others* [2008] CCJ 6 (AJ).
[117] Toolsie Persaud Ltd v Andrew James Investments Ltd and Others [2008] CCJ 5 (AJ).
[118] Lackram Bisnauth v Ramanand Shewprashad and Rajwattie Bisnauth [2009] CCJ 8 (AJ).

increasing trend towards judicial restraint as indicated by its adoption of a teleological approach.[119] Considering the domain of treaty interpretations, Haynes explains:

> Historically, three schools of thought have generally been associated with the interpretation of treaties: (i) the 'intentions of the parties' or 'founding fathers' school; (i) the 'textual' or 'ordinary meaning of the words' school; and (iii) the 'teleological' or 'aims and objects' school. While each of these schools invariably present their respective strengths and concomitant challenges, the teleological approach, which has its sphere of operation almost entirely in the field of general multilateral conventions, seems to be the Caribbean Court of Justice's (CCJ's) preferred approach.[120]

The teleological approach referenced by Haynes speaks to interpretation based on a perception of the spirit of the treaty instead of the letter of the treaty.[121] It assumes that where there is any case of doubt, the legislative provision has to be interpreted in a manner which has consistency with the goals and purposes which are either implicitly or explicitly derived from a legal rule, or set of rules.[122] This approach was demonstrated by the CCJ in *Trinidad Cement Limited and TCL Guyana Inc v Guyana*[123] where the appellants, being private entities involved in the production and distribution of cement, sought special leave to appear before the court.[124] The appellants request was founded on their allegation that Guyana was in breach of Article 82 of the RTC which provides for the establishment and maintenance of a Common External Tariff (CET) by Member States on any cement imported from third states.[125] While Guyana admitted its suspension of the CET, its Attorney General claimed that the applicants had no *locus standi* to initiate proceedings before the CCJ as they were not State Parties to the RTC, and that they had failed to satisfy the conditions established by the RTC for the institution of proceedings by a

[119] Haynes 'Mapping the Path of the Teleological Approach (see n. 114, p. 259), 584.
[120] Ibid, 573
[121] Ibid, 574
[122] Ibid.
[123] Trinidad Cement Limited and TCL Guyana Inc v Guyana [2009] CCJ 1 (OJ)
[124] Ibid, [7]
[125] Ibid, [13].

private entity.[126] The CCJ disagreed, and granted the parties leave, adjudicating that it was sufficient enough for the applicants to be incorporated or registered by way of the domestic legislation of the member state. The CCJ's conclusion was founded on the basis of a teleological interpretation of Article 222 of the RTC,[127] which in the court's view was to be broadly constructed when deciding whether an applicant qualifies as having both a natural and juridicial right to sue a state party. Accordingly, the court observed:

> In interpreting the RTC the Court does not intend to place undue reliance on a literal approach. Reliance on the text of a treaty to the detriment of its object and purpose is contrary to the rule expressed in Article 31 of the VCLT and does not accord with the jurisprudence of the International Court of Justice.[128]

On this point, the court went on to quote a passage from Aust:

> Placing undue emphasis on the text, without regard to what the parties intended; or on what the parties are believed to have intended, regardless of the text; or on the perceived object and purpose in order to make the treaty more 'effective', irrespective of the intentions of the parties, is unlikely to produce a satisfactory result.[129]

In arriving at its decision, the CCJ referred to the preamble of the RTC to determine its object and purpose, and explained that the contracting member states of CARICOM are intent on "transforming the CARICOM sub-region into a viable

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[126] Ibid, para. 2.
[127] Article 22 of the RTC states:
Persons, natural or juridical, of a Contracting Party may, with the special leave of the Court, be allowed to appear as parties in proceedings before the Court where:
(a) the Court has determined in any particular case that this Treaty intended that a right or benefit conferred by or under this Treaty on a Contracting Party shall ensure to the benefit of such persons directly; and
(b) the persons concerned have established that such persons have been prejudiced in respect of the enjoyment of the right or benefit mentioned in paragraph (a) of this Article; and
(c) the Contracting Party entitled to espouse the claim in proceedings before the Court has:
(i) omitted or declined to espouse the claim, or
(ii) expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled; and
(d) the Court has found that the interest of justice requires that the persons be allowed to espouse the claim.
[128] *TCL v Guyana* (see n. 123, p. 261), [11]
[129] Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2006), 185.

collectively of States for the sustainable economic and social development of their peoples"[130] and that because the CSME is principally private sector driven, this would mean that private entities possessed adequate standing to appear before the court. Furthermore, although not expressly stated in the RTC, the court held that the rights and benefits under the treaty may be derived or inferred from correlative obligations imposed upon member states.[131]

Haynes however warns of certain dangers of a teleological approach, stating that whilst the CCJ should be commended for the use of this approach to resolve normative disputes arising from the context of CARICOM legal systems, the argument exists that a linguistic or textual approach to legal interpretation should remain the primary approach.[132] The basis for this is the argument that one of the functions of law is to reduce uncertainty and to provide solutions where there is a conflict of values.[133] Furthermore, coherence and uniformity in law can be achieved through the textual approach, as well as "fundamental constitutional and politico-moral values including formal equality, legal certainty, legal stability and the predictability by citizens of the probable mode of application of legal norms."[134]

However, according to Conway, when legal text is unclear, then recourse to legal traditions, or originalist interpretation can be able to provide assistance to the understanding of the legal problem.[135] Conway elaborates:

> Relying on legal traditions increases the degree of legal certainty and predictability, all the more so if such interpretation becomes characteristic in a legal system so that the expectation of participants in the system is that legal tradition provides a point of reference when the law is, on a purely textual reading, less certain, i.e. there is a

[130] *TCL v Guyana* (see n. 123, p. 261), [13].
[131] Ibid, [32].
[132] Haynes 'Mapping the Path of the Teleological Approach' (see n. 114, p. 259), 588.
[133] Ibid.
[134] Ibid.
[135] Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: Cambridge University Press, 2012), 158.

> feedback effect in the establishment of an originalist interpretative framework. In EU law, for example, legal traditions from a majority of Member States can be identified clearly through comparative research.[136]

As the CCJ is still in its early stages of its operation, there is still the opportunity for further observation on the evolution of how it adjudicates on conflicts between the legal traditions of the region, localized legal traditions and international norms. One legal tradition which generally has a shared heritage across the region is that of the written constitution. According to Lord Diplock in *Hinds v R*[137], the written constitution embodies:

> ….what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future.[138]

The CCJ therefore has an important function in how it adjudicates on constitutional principles. Historically, these constitutions had been borne from the struggle by the people of the English speaking Caribbean to achieve political and legal independence. The constitutional arrangement represents a social contract built on natural law principles translated into a positivist framework, and with an authorship belonging to the people of the region. It is regarded as a foundation for determining the basic norm, as legal norms are tested against its provisions. In essence, the constitutional process is one which ought to facilitate self-determination, and therefore the CCJ holds the significant responsibility of interpreting and constructing its provisions. It is within this context, an argument for the sovereignty of the CCJ serves to be persuasive justification for a departure from the JCPC. According to McIntosh, this sovereignty would mean that the

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[136] Ibid.
[137] *Hinds v R* [1977] AC 195.
[138] Ibid, 212.

CCJ is performing acts of self-determination for the region, thereby defining the *Caribbean Polity*.[139]

This notion of self-determination through the CCJ can also be materialized through its right of authorship, as its provision of constitutional interpretation has the potential of being a catalyst for new legal scholarship emerging from the region. Legal practitioners in the English speaking Caribbean heavily rely on English constitutional law books, but jurisprudence emanating from the CCJ would now allow for the writing of authoritative texts which are more region specific. Furthermore, the CCJ interpreting and enforcing the RTC and the constitutional and legislative provisions of the region would contribute to the success of the CSME in a social and economic sense, especially by offering a steady platform for the operation of the rule of law and the safeguarding of democratic governance.

Despite any progress made by the CCJ in establishing itself as a final court of appeal, full adoption of its original and appellate jurisdictions continue to be slow. The court has arguably struggled to comprehensively attract CARICOM member states as well as a substantial caseload.[140] As Cabatingan explains, the legal history of the region is instead dominated by the JCPC, with its "long and illustrious past and a seemingly unending future."[141] In considering how to confront this hindrance, Cabatingan explains that the CCJ's case for adoption would hinge on the court's dedication to creating an indigenous jurisprudence which would demonstrate "the final step on the long road to full independence."[142] Cabatingan however remonstrates that where the CCJ is perceived as associating its existence "too closely to the stubbornly persistent colonial reminder"[143] of

[139] Simeon McIntosh, Constituting the Caribbean Community, The Role of the Caribbean Court of Justice (Barbados: The Caribbean Law Institute Centre, 2009).
[140] Lee Cabatingan, 'Time and Transcendence: Narrating Higher Authority at the Caribbean Court of Justice', *Law & Society Review* (2016) Vol. 50, No. 4 (2016). 674-702, (p. 682).
[141] Ibid., 681.
[142] Ibid.
[143] Ibid.

the JCPC, this could result in the court undermining its foundational elements. Likewise, she sees an existence which is too closely associated with regional integration as also harming the CCJ's prospects "since these endeavors have not, for the most part, enjoyed success or support amongst the populations they were designed to serve."[144] The challenge for the CCJ according to Cabatingan is staying clear of a colonial past while having to "face its own pastlessness and confront its own precarious future."[145] Compared to the wealth of jurisprudence generated by the JCPC, the CCJ "has had limited time to establish a sufficient body of precedent, settle its procedures, or create its customs of practice."[146] Accordingly she contends that the CCJ's public reputation is one of novelty instead of continuity, as well as one of change instead of stability, and this has hindered its adoption:

> Novelty, notably, is frequently met with foot-dragging in the Caribbean, where many often speak of changes in law as "harmonization" rather than reform and think of the timeline for change as happening over "generations" rather than years. Thus this Court, where everything is new and presently being made, has been met with more suspicion than it has with celebration and has enjoyed solitude more so than authority.[147]

In addition to the previously mentioned sentiments expressed by Cabatingan, it should also be considered that at the level of the public, a certain belief system needs to be at work, which would constitute to the public legitimization of the court's authority. As Derrida explains, "the authority of laws rests on the credit that is granted them. One believes in it; that is their only foundation. This act of faith is not an ontological or rational foundation."[148] By this measure, the authority of law does not rest exclusively on

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[144] Ibid.
[145] Ibid.
[146] Ibid., 682.
[147] Ibid.
[148] Jacques Derrida, 'The Force of Law: The Mystical Foundation of Authority,' in Gil Anidijar (ed.), *Acts of Religion*, (New York: Routledge, 2002), 240.

demonstrating the building of trust, but instead by some type of 'myth' whose rhetoric helps to generate and establish beliefs about the law, from which authority is derived. In considering this notion however, it would be difficult to combine the fundamental doctrines of the CCJ with eschatological functions often associated with persuading the public belief system to signal its favour with a particular law-making institution. Instead it is suggested that the catalyst for comprehensive adoption of the CCJ would arguably be a better appreciation of the CCJ's *sui generis* nature, "just as the Caribbean spirit is a thing unto itself."[149] There ought to be a greater understanding that:

> The CCJ has the authority to represent a Caribbean people because it was borne from the very same Caribbeanness that constituted those people; it has the authority to determine cases in the present because it is thoroughly saturated in this Caribbeanness; and it has the authority to determine the future of the Caribbean because it is and always has been the manifestation of Caribbeanness.[150]

This 'Caribbeanness' that Cabatingan describes arguably evidences the perpetual temporality of the CCJ as a Caribbean court, and such narrative has a more profound focus in terms of acceptance of the Court's authority.[151]

Alternatively, Maharajh contends that CARICOM member states may be delaying a departure from the jurisdiction of the JCPC "for fear of scaring away foreign investors who may not yet have confidence in the legitimacy or power of the CCJ."[152] Nonetheless, he asserts that a slow process in the growth and adoption of the CCJ can be favourable to the court. He draws comparison to the European Court of Justice (ECJ), which he notes, "moved slowly, waiting eleven years before it attempted to increase its regional authority and taking rare incremental steps over the course of several decades

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[149] Cabatingan, *Time and Transcendence*, (See n. 140, p 265), 696.
[150] Ibid.
[151] Ibid., 699.
[152] Andrew N. Maharajh, 'The Caribbean Court of Justice: A Horizontally and Vertically Comparative Study of the Caribbean's First Independent and Interdependent Court', *Cornell International Law Journal* (2014) Vol. 47, 735-766 (p. 738).

after that." [153] Maharajh notes that this is evidenced by the CCJ not advancing controversial goals that might heavily conflict with the views of contracting parties, while also not taking "any steps back from the foundation that was laid"[154] by the JCPC. In this regard, Maharajh notes the failure of the South African Development Community Tribunal (SADCT), which he felt "stepped too far too quickly, provoking member states under its jurisdiction in only its first year of operation."[155] He instead suggests that CARICOM states are afforded the opportunity to "wait until they are comfortable enough with the court to cede jurisdiction to it."[156] This, he believes, would allow for a better understanding of the operations of the court.[157] He contends that this type of growth is similar to what was experienced by the ECJ, "where only a few states signed on to the EU and ECJ, with the rest joining slowly as time progressed."[158]

Conclusion

In the form of the CCJ, the Commonwealth Caribbean region has the opportunity to lay claim to a native regional court in accordance with its establishment by CARICOM Member States as an act of collective autonomy and self-identity. Arising from this experience is the possibility of clarification, guidance and potential harmonization of how fundamental rights and freedoms as articulated in the regional constitutions are to be interpreted. Trust in the court would bestow on it the confidence in assuming the responsibility of guiding the region to a common position on current controversial matters which may need judicial clarification at a regional level, such as the fixed death penalty and its protection from challenges of constitutionality via the application of general and

[153] Ibid., 763.
[154] Ibid., 762.
[155] Ibid., 756.
[156] Ibid., 765.
[157] Ibid.
[158] Ibid.

partial savings law clauses; attention (or lack thereof) regarding laws to guarantee the protection of Lesbian, Gay, Bisexual or Transgender (LGBT) persons; a position on the legality of abortion and the possibility of relaxing cannabis laws in the region, particularly in light of Jamaica's decision to legislate for decriminalization, establishment of a medical marijuana industry and allowance of members of the Rastafarian faith to cultivate cannabis on designated lands.[159]

The CCJ in its original jurisdiction has the potential of building a legal stability and regional rule of law, and is a key player in carving out a specific legal identity for the region. Member States, corporate entities and private persons may utilize the court by requesting adjudication on disputes generated by the operation of the CSME. The potential for economic and social growth and development is therefore favourable, as a strong regional judicial system would positively appeal to foreign investors seeking assurance that commercial disputes would be settled by an independent and responsive adjudicating body. While it is no certainty that the full adoption of both the appellate and original jurisdiction of the CCJ would automatically improve the delivery of justice, what should be embraced is that the court being a creation of CARICOM, would reflect and understand certain Caribbean values in a way which may not be achieved by a court located outside of the region.

[159] Jamaica Dangerous Drugs (Amendment) Act 2015.

CONCLUSION

The overarching issue that this thesis has set out to consider is whether there exists a specific Commonwealth Caribbean legal identity which has emerged from a post-colonial revision of the inherited Westminster-framed legal framework. This linked to the objective of the thesis to contemplate the notion that the region needs to arrive at a position of post-colonial 'certainty,' as such, requiring careful consideration of how existing legal norms address diversity and differences in belief systems, particularly in areas such as land rights, family ties and generally how equality is understood in terms of its social and economic dimensions. This thesis concludes by suggesting that attempts to revisit the Westminster modelled framework have been slow and thus by extension, the expression of a Commonwealth Caribbean legal identity is restricted to the extent by which the framework has adapted to become relevant to regional conditions. The problem of a lack of a proper foundation for the Westminster modelled constitutions in the Commonwealth Caribbean in terms of relevance is a suggested systematic flaw. The suggestion is made that there is the need to reconsider how legal relationships are defined between the state and non-state actors, as well as amongst non-state actors in terms of how rights are created and granted. As such, the conclusion will be put forward that a shift to a system allowing for decentralised governance, with the state's role being a facilitator of transactions would allow for a more dynamic rule of law which better caters to differences in ideals and belief systems. Concluding suggestions will also be made regarding a change in the Commonwealth Caribbean constitutional approach to social justice in the economic domain. This will be followed by final thoughts on how land and property rights should be approached. It is also suggested that in certain spheres, Commonwealth Caribbean legal systems have provided resistance to international law

and international human rights standards, particularly in terms of the death penalty jurisprudence, as discussed in Chapters I and VI. A concluding thought on the value to Commonwealth Caribbean legal systems of international law as a decentralised legal system will also be conveyed, with final contemplation on the future challenge of constitutional globalization.

1. Lack of Proper Foundation for the Westminster System

As analysed in this thesis, the lack of proper foundation for the implementation of a Westminster modelled system across the Commonwealth Caribbean makes the process of constitutional reform more difficult. The rushed colonial imposition and post-colonial transfer of the constitutional system without questioning its overall foundation makes any reform potentially flawed. As analysed in Chapter V, the link between local knowledge and post-colonial 'certainty' is an important missing ingredient calling for the need for a process of historical 'truth discovery' in order to fully grasp what it means to be sovereign, and to determine whether there is rationality in maintaining current governance structures. One of the fundamental problems relates to the dominant formalism of the Westminster system which undermines the understanding of diverse belief systems. A change to approaches which focus more on diversity was suggested and also that there be a system which facilitates a dynamic and adaptable rule of law which is able to access scenarios that are informed by local knowledge. O'Brien describes the problem of the unsteady constitutional foundation in the following passage:

> Thus, by the time of their independence most of these former colonies had been self-governing for little over a decade, and in some cases even less. Their Independence Constitutions, which were the product of negotiation between the main political parties and the Colonial office, had, in some cases, been prepared in great haste and with very limited opportunity for public consultation. Such was the desire by all the parties concerned for independence to succeed, that it was simply assumed that the

> Westminster model, which provided the blueprint for these Independence Constitutions, could be adapted to meet the needs and demands of these post-colonies. The empirical evidence upon which this assumption was based was, however, limited, to say the least.[1]

He goes on to explain that although the political leaders within the region might have been familiar with the institutional aspects of the Westminster system and its offices, "it was still too soon to know whether those institutions and offices could be successfully replicated for example, in some of the very small islands."[2] Furthermore, it was not known whether "the conventions, understandings, habits or practices upon which the Westminster model is based, and which had been evolving in Britain over a period of four centuries, would take root, let alone flourish when transplanted to Caribbean soil."[3] For Best, difficulties that the region has experienced in terms of its governance did not arise because of the Westminster framed constitutions becoming more localized, but instead the problem was also one which innately existed at the time of adoption.[4] Writing on the foundational problems in Trinidad and Tobago, Best comments that "by the time the transfer of power was at hand in Marlborough House in 1962, legitimacy had become less a product of the constitutional or even political arrangements and more a property of 'doctor politics' and maximum leadership in the competing communities."[5] On this point, Chapter V advocated a departure from the discursive norms shaped by past colonial authority, and suggested the empowerment at a grassroots level of those persons and groups who are in discursive resistance where their beliefs and traditions are not afforded legal system protection. This type of empowerment is suggested as being necessary as

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[1] Derek O'Brien, The Constitutional Systems of the Commonwealth Caribbean: A Contextual Analysis (London: Bloomsbury Publishing, 2014), 34.
[2] Ibid, 35.
[3] Ibid.
[4] Lloyd Best, '1970 and 1990: Recurring Crises of Political Legitimacy', in Selwyn Ryan and Taimoon Stewart (eds.) *The Black Power Revolution 1970: A Retrospective* (St. Augustine, Trinidad: UWI, 1995), 716-717.
[5] Ibid.

there exists as a possibility the threat of government not being accountable to those persons in discursive resistance.

According to Treisman, government accountability exists to the extent that citizens can obtain precise information on its performance, and remove poorly performing incumbents from office.[6] This understanding of accountability as a constitutional principle also provides a negative dichotomy. For example, policies might be enacted that favours the majority, and therefore the government is accountable to the majority when it comes to upholding the policy. Policies might be based on values which promotes the norms of the majority, in effect dismissing, or even criminalizing the views of the minorities. There is also the possibility that the choices of a local minority might conflict with that of a national majority, and this would mean that the government is not accountable to the local minority because they have been unsuccessful in their vote. A demonstration of this dilemma is given by Treisman, who writes:

> Suppose that the majority nationwide favours legal abortion throughout the country, but in one-third of the local districts a majority favours a ban. Listening to the nationwide majority would mean legalizing abortion nationwide; listening to each local majority would mean banning abortion in one-third of the districts. These outcomes obviously make different sets of citizens happy. One might argue on moral grounds about which majority has a right to make decisions on this issue. But it seems reasonable to say that under centralization (which favors the nationwide majority) and decentralisation (which favors the local majorities) government is equally accountable – just accountable to different majorities.[7]

The problem is that within the Westminster modelled system, competition at the central level for political power suggests that politicians will promote the narrative of the majority in order to secure votes. As a consequence of this practice, individual autonomy

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[6] Daniel Treisman, *The Architecture of Government: Rethinking Political Decentralisation* (Cambridge: Cambridge University Press, 2007), 180.
[7] Ibid.

of certain segments of the society is compromised if the ontological assumption is made that a free society exists when the understanding of social realities, whether scientific or based on ethical perspectives, is enabled only where there is an unencumbered individualistic orientation.[8] Accordingly, Barry states:

> ...spontaneous individual activity accidentally maximises social well-being more effectively than any deliberate, rationalistic plan could....and it is said that in a moral sense the attempt to abridge that individual autonomy by coercive activity, of which that by the state is the most prevalent, destroys the 'separateness' and identity of each person and makes him a means to be used for the ends of some social or collective entity. Of course, in the latter argument the autonomy of the individual must be bounded by rules and the pursuit of personal goals constrained by 'law' and ultimately morality: the general argument is that such law and morality should be limited to enforcing the equal right of each individual to pursue his own interest.[9]

The suggestion however, is not one for enforced egalitarianism to guarantee individual preservation, but instead for the allowance of participation in processes which can have productive outcomes both to the individual and society. Instead, the tradition of the Westminster system is one which conceptualizes moral perfection in relation to the sacrifice of personal values at the expense of the values of others. The system urges a type of morality "which obliges self-restraint not merely in those areas which require us to recognise the rights of others but also in actions which lead to purely self-fulfilment even though they do not abrogate or abridge such rights."[10] The centralized legal system borne from moral persuasion is potentially dangerous to individualism as moral positions "do not convey information about the world but merely express the personal preferences of the utterer."[11] Friedman intrepidly qualifies this perspective in his claim that economic

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[8] Norman Barry, *On Classical Liberalism and Libertarianism* (London: Macmillan Publishing, 1986), 4.
[9] Ibid.
[10] Ibid, 7.
[11] Ibid, 9.

and social disputes between men take place as opposed to fundamental differences in basic values, as differences in this area are "about which men can ultimately only fight."[12] In this regard, it is suggested that there ought to be a re-thinking of legal relationships between state and non-state actors, as well as amongst non-state actors when it comes to constitutional and legal system protection.

2. Re-thinking Legal Relationships

Chapters IV and V discussed the link between legal formalism and capitalism and suggested that morality is excluded from the decision making process in the situation where a formalist legal system is designed to protect capitalism, at the expense of materializing justice. What Commonwealth Caribbean states need to consider is the possibility of the rule of law being shaped by way of the legal personality of the state conflicting with that of other actors, for instance, the growth of the corporate actor and its legal personality. In what is considered to be a classical analysis of corporate structures, Berle and Means discuss the threat of the legal identity of the state when confronted with the legal identity of the modern corporation:

> The rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state – economic power versus political power, each strong in its own field. The state seeks in some aspects to regulate the corporation, while the corporation, steadily becoming more powerful, makes every effort to avoid such regulation. Where its own interests are concerned, it even attempts to dominate the state. The future may see the economic organism, now typified by the corporation, not only on an equal plane with the state, but possibly even superseding it as the dominant form of social organization. The law of corporations, accordingly, might well be considered as a potential constitutional law

[12] Ibid, 18.

> for the new economic state, while business practice is increasingly assuming the aspect of economic statesmanship.[13]

Thus, there is a danger of an emerging and dominant threat of constitutionalism of the economic sphere designed to protect corporations which have pursued favourable rules. Where this is the situation, it may be hypothesised that the state in the social realm would now become more concerned with finding ways to secure the overall collective good of the public, instead of creating specific rights to protect specific groups based on a particular type of characterization. For example, the state would become more active in matters such as facilitating access to markets for citizens regardless of group distinctions, or ensuring environmental security and sustainability. To qualify a state's agenda to pursue the provision of general public goods, there is the argument that there is a problem of social morality being translated into rules which create rights for specific groups because this would mean the creation of rights based on perceptions, or anticipation of social conflict. As Koskenniemi explains:

> Social morality cannot, however, be translated exhaustively into rights language. Such language is based on an ideal of individual autonomy that perceives social conflict in terms of interpersonal relationship...abstract personhood and the conception of individual rights that goes with it cannot address the sense of injustice that arises, for example, from structural (economic/social) causation or from the sense of belonging to an oppressed minority. But also in many other contexts, posing the normative issue in terms of individual rights fails to grasp its social meaning. To take an example from Joseph Raz: I may own a painting by Van Gogh. Nonetheless, I may have a duty not to destroy it even if nobody has a correlative right. The value of art, in this case, cannot be expressed in rights language – just as little as, for instance, the value of a clean

[13] Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (Ardsley, NY: Transnational Publishers, 2005), 313.

> environment in a conflict concerning the carrying out of a contract for a large industrial project.[14]

Accordingly, a concluding suggestion of this thesis is that in order for there to be an evolution as to how rights are understood, the legal process needs to be revisited in terms of legal categorizations and legal relations. There is arguably a type of legal fiction in the assumption of a vertical relationship between the state and all other actors, and in the assumption of a horizontal relationship amongst all other personalities categorized as non-state actors. The fiction is that citizens, corporations, Non-Governmental Organizations (NGOs) and all other non-state entities are assumed to exist in the same space with a common identity and with equality, and this assumption informs much of the theory and the practice of law.[15] A consequence of this arrangement is the creation of a conflict within the system itself as the idea emerges that there should be equality amongst all horizontally located actors specifically when it comes to establishing a relationship of trust in their vertical affiliation with the state. Actors on the horizontal plane, are in fact, not equal because of variations in their influence on economic and political power. It is instead proposed that a system is developed whereby less weight is placed on the vertical relationship, and more importance on the relationships between horizontal actors. A shift to emphasis on horizontal relationships would provide an even platform allowing for reciprocity in the decision making process, as well as a framework which facilitates the representation of values that reflect the diversity of the region. This is not to say that legislatures and courts have not limited the scope and influence of horizontal actors in their ability to negatively affect each other because of power imbalances. However, re-visiting how legal relationships are defined between state and

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[14] Martii Koskenniemi, 'The Effect of Rights on Political Culture', in Philip Alston (ed.) *The EU and Human Rights* (Oxford: Oxford University Press, 1999), 102, (p. 104).
[15] Uta Kohl and Naomi Salmon, Human Rights in the Market Place: The Exploitation of Rights Protection by Economic Actors (Hampshire: Ashgate Publishing), 242.

non-state actors, and amongst non-state actors at the horizontal level would allow insight into more secure ways of discovering and guaranteeing qualified rights.

In relation to re-visiting how legal relationships are defined, relying on several elements that have been examined throughout the thesis, it is possible to envisage a more Caribbean theoretical model of local decentralised communities which may be established by virtue of characteristics such as common local knowledge or collective similarities will be also suggested.

State Decentralisation as an Alternative to the Westminster modelled System

To re-define legal relationships to foster a dynamic legal system allowing a more dynamic integration of Caribbean informal institutions and customs, there might be a need to dismantle the horizontal relationship between state and non-state actors by establishing a relationship brought about through decentralised governance. In defining 'decentralisation,' according to the United Nations Development Programme (UNDP):

> Decentralization, or decentralizing governance, refers to the restructuring or reorganization of authority so that there is a system of co-responsibility between institutions of governance at the central, regional and local levels according to the principle of subsidiarity, thus increasing the overall quality and effectiveness of the system of governance, while increasing the authority and capacities of sub-national levels.…Decentralization could also be expected to contribute to key elements of good governance, such as increasing people's opportunities for participation in economic, social and political decisions; assisting in developing people's capacities; and enhancing government responsiveness, transparency and accountability.[16]

Proponents of decentralisation view the 'centralized' system as one where power is usually obtained at the 'centre' and controlled by the few in positions of authority, and

[16] United Nations Development Programme (Management Development and Governance Division), *Decentralized Governance Programme: Strengthening Capacity for People - Centered Development* (New York: UNDP, 1997), 4.

therefore individuals, communities and organizations that are removed from the centre "do not have authorities, discretion, or exercise control over their own affairs."[17] Instead, they are "either recipients of policies and programs from the centre, or merely instruments for carrying out the centre's plans and directives."[18] By this view, the centralized power is not capable of effectively observing and understanding diverse realities which are situated outside of its immediate confines, and as a consequence imposes rules and controls which are potentially counterproductive and demeaning.[19] Where this is the case, the Institute of Public Administration of Canada suggests that the "centre loses sight of what and who is to be served, becoming more interested in the means than the ends, because the means are more familiar."[20]

Decentralisation is not an absolute alternative to centralization but instead complementary roles of state and non-state actors should be analysed in order to determine the most effective methods to accomplish desired objectives. Based on the discussions in this thesis, there is the overall sentiment that the Westminster modelled framework has generally not displayed dynamism in allowing Commonwealth Caribbean legal systems to guarantee the security of relevant rights to non-state actors in terms of protecting diversity. As a concluding thought, it is suggested that a legal system borne out of a decentralised governance structure could prove to be a valuable reform initiative. This type of system also has the potential of better ensuring that there is no dominant legal identity which would treat other identities as inferior. The importance of this is that, as discussed throughout the course of this thesis, the legal identity of the state can undermine other legal entities, despite those other legal entities being credible and

[17] Institute of Public Administration of Canada, *Decentralisation and Power-Sharing: Impact on Public Sector Management* (Toronto: Institute of Public Administration of Canada, 1999), 418.
[18] Ibid.
[19] Ibid.
[20] Ibid.

relevant to certain segments of the population based on their historical and cultural histories and evolution.

Re-thinking the constitutional promise of social justice

In considering the values contained within the preambles of Commonwealth Caribbean constitutions, Bulkan explains:

> Caribbean constitutions solemnly affirm and espouse certain values, notably among these being freedom, democracy, social justice, human dignity and equality. These values have been enshrined in preambles, and breathe life into the substantive provisions. They have been repeatedly invoked and enforced by the courts.[21]

Bulkan references Lord Bingham who was "easily the judge to have succeeded Lord Diplock in terms of his command of Caribbean jurisprudence"[22] as affirming that Commonwealth Caribbean constitutions "were meant to usher in a new political order, one promoting values of social justice, inclusionary democracy and human dignity – all values that are incompatible with substantive inequality and the existence of irrational status distinctions."[23] Bulkan further explains:

> Fundamental rights, then – or at least those that promote the values of fairness, equality, political participation, human dignity and the rule of law – are emphatically a part of the identity of Caribbean constitutions, central to their values and the goal of perfection as envisaged in the Guyana model.[24]

In terms of Commonwealth Caribbean Constitutions, social justice considerations are therefore an important component in the pursuance of fundamental rights. To give an explicit example, the Constitution of Trinidad and Tobago states that its citizens are to:

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[21] Arif Bulkan, 'The Limits of Constitution (Re)-making in the Commonwealth Caribbean: Towards the ''Perfect Nation,"' *Canadian Journal of Human Rights* 2:1 (2013), 82-115, (p. 115).
[22] Ibid, 102.
[23] Ibid, 114.
[24] Ibid.

> respect the principles of social justice and therefore believe that the operation of the economic system should result in the material resources of the community being so distributed as to subserve the common good, that there should be adequate means of livelihood for all, that labour should not be exploited or forced by economic necessity to operate in inhumane conditions but that there should be opportunity for advancement on the basis of recognition of merit, ability and integrity...[25]

It is suggested however is that there needs to be a revised construction of, and framework for social justice that addresses matters such as the equality of human dignity and the oppression of certain groups within the society, but more along the lines of justice which allows for unhindered market participation. Social justice as a constitutional guarantee arguably does not take into account certain economic consequences when it comes to centralized redistributive state policies. The argument against the constitutional understanding of social justice is that it is incompatible with orthodox market economics and consequently counter-utilitarian as it assumes a distinction between production and distribution.[26] The economic theory is that income which is distributed to the factors of production such as wages for labour, interest on capital, or rent represents what is required in order for these factors to be at a point of optimal employment.[27] This means that there is "no 'social pie' which is available for distribution in accordance with some external criteria..."[28] Accordingly, Barry states that any attempt to redistribute based on social justice criteria "must inevitably distort the signalling process of a market economy and thus prevent an economic optimum being reached."[29] According to Burke, proponents of social justice "tend to downplay the significance of the discipline of economics, and even to reject it altogether as immoral."[30] However, "basic concepts of economic science, such

[25] Constitution of the Republic of Trinidad and Tobago, Chapter 1:01, Part (b) of the Preamble.
[26] Barry, *Classical Liberalism and Libertarianism* (see n. 8, p. 274), 145.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Thomas Patrick Burke, *The Concept of Justice: Is Social Justice Just?* (New York: Continuum International Publishing, 2011), 23.

as the law of supply and demand or the concept of marginal utility, are neither morally good nor bad but simply express the logic of human interaction..."[31]

It is suggested that protection from coercion as a feature of social justice would allow for the possibility of free competition, whereas economic protection "from the voluntary actions of the market is a contradictory protection as it has the effect of rendering the 'protected' person less economically productive and less capable of competing."[32] Hence, the objectives of a just society could be achieved through principles of non-discrimination in terms of market participation, and constitutional protection should be focused on this outcome. As was previously discussed in the idea of the limited state, the state in a decentralised system acting as a facilitator of transactions would be acting unfavourably to itself if it seeks to limit the market participation of minority groups or discriminate against persons with non-traditional belief systems from market participation.

To illustrate this point, if an individual desires a particular good, he/she would be able to achieve utility if he/she is able to purchase that good. However, if that individual is unable to purchase the good because of a restriction on his/her ability to do so, utility in this particular instance would not be achieved, and it would be one less sale for the shop. If there exists no barriers to market participation, and therefore the individual is able to obtain the good, then both the individual benefits and the shop owner benefits. But, instead of this process being facilitated through a redistribution of wealth, it is suggested that the state, in the role of a facilitator of transactions would be able to benefit from a triadic system whereby it facilitates contracts between communities based on matches made that are informed by a record of metrics such as skill and reputation. In this system, the state would obtain certain incentives such as fees from facilitating

[31] Ibid.
[32] Ibid.

transactions because it will be using its resources to make matches between communities in terms of what would be the most efficient transaction to enter into, and with whom. So the person wanting to go to the shop to purchase a particular good can be incentivized by the state to participate in the entire ecosystem because other than the individual's desire to go to the shop, the state, by encouraging the individual to participate in the market will obtain benefit. By incentivizing all individuals within the state to participate in the exchange of their skills, goods and services for reward, it is suggested that what this encourages is a Hegelian transition of the individual from a state of consciousness to absolute consciousness. This would conceptually mean that consciousness which is informed by objects external to it and which exists at the level of the individual's desires or will (such as the desire to make a certain purchase from the shop) are capable of being transitioned to absolute knowledge where the individual is now able to develop a cognitive attitude through an unrestricted dialectic process (in this instance, unrestricted and state incentivized market participation) from which he can discover how he can best use his skill to obtain a medium which can be used to make his purchase. In explaining further, Stern states that there exists the interpretation that:

> what underpins the transition from consciousness to self-consciousness is not a shift from realism to idealism, but from theory to practice, where in theorizing we have a 'detached' view of the world, and so abstract from our position as subjects in the world, whereas in practical activity we act on the world and so put ourselves as subjects at the centre of things.[33]

By this measure, it is therefore suggested that Commonwealth Caribbean constitutions ought to place greater emphasis on the objective of unrestricted access of all individuals to participation in economy and society with the state facilitating and encouraging exchange through providing incentives. The individual would be able to use

[33] Robert Stern, *Hegel and the Phenomenology of Spirit* (London: Routledge, 2002), 67.

incentives as a way to improve his skills and reputation within the entire ecosystem when it comes to the exchange of goods and services.

3. Land and Property Rights

Chapter III which addressed access to land and tenure security gave the example of the '*Sou-Sou'* land movement in Trinidad and Tobago as a grassroots movement for landless communities to pool resources together to purchase land. It also discussed that this project, despite being identified by UN Habitat as an innovative project for the International Year of Shelter for the Homeless, became unsustainable because of a lack of state co-operation and encouragement. Instead of providing incentives for the programme from which the state could have benefitted, the government of Trinidad and Tobago made no concession in their refusal of the granting of formal title to the communities as the lands purchased were designated for agricultural and not residential use. This was despite the lands belonging to failed estates, which were being sold at a reduced price. Chapter III also discussed 'Operation PRIDE' in Jamaica, where that country's government attempted to encourage the pooling together of community resources through a self-help programme which would allow for the improvement of community infrastructure. The government incentive offered would be a land settlement policy framework for those persons who the programme targeted, namely those persons who were unable to participate in the formal land market. By incentivizing project participants, the hope was that sustainable communities would be developed through participation which allowed for the growth of resources and as a result, the improvement of community infrastructure. However, the project failed due to allegations of corruption, government mismanagement and overall poor policy design and implementation. Unfortunately, both the *'Sou-Sou'* land movement and 'Operation PRIDE' were unsustainable because of a lack of government incentive for the former, and in the later,

the failure of the Jamaican government to provide a solid platform to properly facilitate the project.

What the aforementioned projects also bring to the discussion is the point that while there are legal rights derived from obtaining formal land title, there is generally a lack of legislative protection in the absence of formal title. As Gilbert observes, in "many countries, access to rights over lands are often stratified and based on hierarchical and segregated systems where the poorest and less educated do not hold security of land tenure."[34] This is no different in the Commonwealth Caribbean. As discussed in Chapters I and III, control of lands in the Commonwealth Caribbean had historically been used as instruments of colonization and oppression during the era of slavery, and as a consequence, informal systems of land use remain as a legacy of this era. Chapter III demonstrated however that certain rights, for instance, usufructuary rights, can arise from informal or customary land possession. As a concluding thought on this point, it is suggested that the creation of rights from customary or other types of informal land use needs to translate into the ability of individuals or communities to either obtain formal title, or legal recognition which would permit them the use of the resources of the land without encumbrance, for their economic or social benefit. According to Bonfiglioli:

> The general principles behind this approach are that the persons or groups most likely to suffer from the misuse of natural resources are those with the greatest incentive to use resource rights to prevent environmental damage, and that community organizations can establish effective access rules and mechanisms for monitoring and enforcing the cooperative management of forests, land, livestock or water.[35]

Furthermore, on the point of benefits of land rights, Gilbert explains:

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[34] Jérémie Gilbert, 'Land Rights as Human Rights: The Case for a Specific Right to Land,' *SUR: International Journal on Human Rights*, 18 (2013), 115-136, (p. 115).
[35] Angelo Bonfiglioli, Lands of the Poor: Local Environmental Governance and the Decentralized Management of Natural Resources (New York: United Nations Capital Development Fund, 2004), 32.

> Regulations and policies governing land rights are often at the heart of any major economic and social reform. Land rights play a catalytic role in economic growth, social development, and poverty alleviation.[36]

In essence, securing market access to persons who are excluded from the formal system of land titling would mean that that they would be able to securely leverage the resources of the land, where the use of the land as a form of livelihood is desired. As Gilbert states, there is "a strong link between use, access to, and ownership of land on the one hand, and development and poverty reduction on the other."[37] Gilbert makes the case for land rights as a fundamental human right that would not only provide economic security, but also preservation of culture and identity:

> As traditional access and ownership rights for women, minorities, migrants and pastoralists are ignored or reduced....these populations are increasingly claiming that their land rights are part of their fundamental human rights. Under the banner land rights are human rights, they are claiming that land represent not only a very valuable economic asset but is also a source of identity and culture.[38]

In the absence of security of legal recognition, there is the possibility that persons who are not part of the formal system would be subject to the possibility of the unregistered land being obtained by more powerful interests.

De Soto advocates the importance of property rights in promoting economic prosperity and alleviating poverty by presenting the view that poor persons lack "easy access to the property mechanisms that could legally fix the economic potential of their assets so that they could be used to produce, secure, or guarantee greater value."[39] In the absence of rights which allow property to be used for economic efficiency, there is therefore the problem of 'dead capital.'[40] The argument is that the economy could be

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[36] Gilbert, *Land Rights as Human Rights* (see n. 34, p. 285), 116.
[37] Ibid, 128.
[38] Ibid, 129.
[39] Hernando de Soto, *The Mystery of Capital* (London: Black Swan, 2001), 46.
[40] Ibid, 14-35.

constrained, for example, by the absence of secure title rather than by the absence of wealth because the legal environment would not be supporting the possibility of illiquid wealth being pledged as a collateral bond.[41] While there are instances where property might have non-market value to its holders, the argument is for legal system support in the event that the holder of the property decides on using it in the market. The challenge however for Commonwealth Caribbean states, especially regarding those areas where informal rules may be relatively strong, is to understand how non-institutional practices, such as informal cultural norms might affect or modify the establishment of formal property rights as they are currently understood. For example, in the area of family law, if it is assumed that private property rights are strongly and clearly established, and "the formal institution of such property rights grants entitlements to the family, to the head of the household, or to women and men,"[42] there is also the likelihood "that this formal arrangement will be heavily affected"[43] by cultural frameworks. Once this is understood, the next step would be to arrive at a position of harmony so that the informal system would be able to operate in a space where it has the protection of formal law and solutions are found for conflicts which do not overall pose a threat to the rule of law. The difficulty however is translating informal systems into a technical legal regime which affords protection but at the same time maintains the autonomy of the informal system.

Regarding the preservation of localized practices, formal rule of law recognition and protection of informal systems in terms of property rights may also be considered as adding value to the suggestion of a decentralised governance system. This is because, other than the concession of the state facilitating transactions by non-state actors if they chose to use their property for economic activities, the social and economic

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[41] Timothy Besley and Maitreesh Ghatak, *Property Rights and Economic Development* (London: London School of Economics, 2009), 20.
[42] Lan Cao, 'Informal Institutions and Property Rights,' *Brigham-Kanner Property Rights Conference Journal*, (2012), 263-279, (p. 272).
[43] Ibid.

construction of informal property regimes at a localized level will not solely be determined by the centralized body. The state would have the policy choice of incentivizing the individual to use his property at market if this fits in with broader economic state objectives. However, at the same time, the individual has the choice of remaining in the 'informal' space and knowing that its boundaries are not only recognised, but have not been compromised by state actors due to the state's pursuance of wider policy objectives. In fact, decisions on property rights will not be a reflection of political authority but instead will be devolved to local actors who are more familiar with local conditions. Decentralisation would arguably protect non-state actors from a 'tragedy of the commons' as legal system recognition of their claims to localized property rights based on informal systems would be assured, instead of being negated by more powerful actors. Instead, in a sense, a new commons is created in that the benefits of resources, for example, are specifically designated to local actors. As Di Gregorio, Dohrn and Meinzen-Dick state:

> As in the case of....natural resource management (such as forestry, fisheries, water management), so also in the case of land tenure there has been growing recognition of the limitations of state capacities of delivering services, especially in rural areas. Not only are the costs of providing services in many rural areas very high, but state institutions often lack the local knowledge needed to be effective. This has prompted a search for ways to supplement state capacity by involving local people, often through decentralisation or devolution programs.[44]

However, they also suggest that the process is not always straightforward:

> .....getting that local involvement is not always easy. First, central authorities have often been reluctant to transfer real authority to local bodies, which reduces the incentives and effectiveness of the latter. Second, there is some ambiguity and contention regarding whether the appropriate local bodies are outposts of government

[44] Monica Di Gregorio, Stephan Dohrn and Ruth Meinzen-Dick, *Decentralisation, Pro-poor Land Policies and Democratic Governance* (Oslo: Oslo Governance Centre, 2008), 23.

> departments, locally elected councils, chiefs or other customary authorities, newly constituted user groups, NGOs, or even private firms. The local institutions that are selected are not always forthcoming to pick up the additional costs for their participation, and it generally requires a substantial state investment of time, personnel, and funds to set up the partnerships between central and local institutions and build their capacity to carry out their expected roles in land tenure reform.[45]

Nonetheless, decentralisation is still suggested as an important avenue in the securing the benefits of localized resources to local institutions. As suggested by Bonfiglioli, the international community is also increasingly accepting the principle of the devolution of rights to local actors, with the World Bank recognizing that "the highly centralized institutional structure that characterizes many government administration systems can lead to losses in effectiveness of development investments and policies."[46]

4. Potential of International Law as a decentralised system and the challenge of Globalization of Constitutional Law

Throughout the course of this thesis, the suggestion has been made that Commonwealth Caribbean states look to international norms to guide domestic law, particularly in terms of controversial issues such as land rights, the death penalty and Lesbian, Gay, Bisexual and Transgender (LGBT) rights. As a concluding thought, it is posited that in revisiting the social contract in terms of the legal relationships of state and non-state actors, Commonwealth Caribbean constitutions ought to recognise the value of international law as a decentralised body of law and international legal norms in shaping municipal jurisprudence. This section will consider the importance of individuals as subjects of international law in making the concluding suggestion that its decentralised nature can add to the sustainability of local communities and customs. It is also suggested

[45] Ibid, 24.
[46] Bonfiglioli, *Lands of the Poor* (see n. 35, p. 285), 33.

that Commonwealth Caribbean states need to carefully consider the issue of the globalization of constitutional law, and consider whether a modern day neoliberal process will actually compromise localized participants in terms of their involvement in the economic system.

Value of decentralised international law to the individual and localized communities

The origins of international law suggest a limited role for private individuals or firms.[47] Where individuals or private entities feel aggrieved by a foreign government, typically they are required to access an international forum for dispute resolution through their government.[48] This was reflective of the positivist doctrine of international law which ascertained that the private individual could not directly be a subject of international law because the system is based on the common consent of individual states, and not individual human beings. Therefore, international law was one which governed the international conduct of the state, and not of the individual.[49] By the positivist doctrine, the rights and obligations of the private individual existed within his own country or another country in which he might be residing in. It is within this space that the individual could, for instance, sue and be sued, or commit crimes and be punished according to the provisions of private and municipal law.[50] In terms of the 'realist' perspective of international law, Reus-Smit explains:

> What marks it off from the law of the nation-state is its decentralised character, the fact that international law's legislative, adjudicative, and enforcement procedures operate without a central authority. Ignoring altogether the centrality of customary

[47] Peter Pavel Remec, The Position of the Individual in International Law according to Grotius and Vattel (The Hague: Martinus Nijhoff, 1960), 4-5.
[48] Ibid, 4.
[49] Ibid, 3.
[50] Ibid, 4.

> law and *opinio juris*, realists stress that states are only bound by rules to which they have consented, that it is states who judge the fit between the law and their actions, and that it is states who must be relied upon to enforce their own compliance.[51]

However, there has arguably been a shift away from the traditional positivist approach, with the major landmark being the decisions of the Nuremberg Tribunal which held that crimes against international law "are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[52] According to Janis, the Nuremberg trials did not take place in isolation, but instead "had a profound influence on other elements of modern international law."[53] Janis suggests for instance that Nuremberg had an "important impact on the formulation and implementation of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms."[54]

It is suggested that the customary development of international law lends legitimacy to the claim that it is of value to localized communities in their rule of law development. The argument is that international law would have evolved through its customary nature in a way which would also understand the development process that local communities would be experiencing in terms of their relationship with custom. Consider for instance, the customary development of international law as a decentralised process. Its customary characteristics would have emerged through the non-coordinated interactions of actors, with each actor seeking to advance its interest. As time progresses, and in the course of interaction, "welfare-maximizing norms beat out inferior ones."[55] As Kontorovich observes:

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[51] Christian Reus-Smit, 'The Politics of International Law, in Christian Reus-Smit (ed.) *The Politics of International Law* (Cambridge: Cambridge University Press, 2009), 17.
[52] Judgment of the Nuremberg International Military Tribunal 1946 (1947) 41 AJIL 172, 221.
[53] Mark Janis, 'Individuals as Subjects of International Law', *Cornell International Law Journal*, 17:1 (1984), 61-78, (p. 66).
[54] Ibid.
[55] Eugene Kontorovich, 'Inefficient Customs in International Law', *University of Chicago, Public Law Working Paper No. 154* (2007), 859-922, (p. 886).

> In the beginning, an issue exists that must be resolved one way or another. A series of interactions between group members allows for testing of various possible behaviors. Indeed, the behaviors are not chosen from a menu, but may be invented by the parties based on their view of the best way to deal with a situation—or they may even be randomly chosen. Because behaviors are chosen in the context of a consensual interaction between members, self-serving or opportunistic behaviour will be rejected by one party or the other. What will be left is a range of behaviors that might plausibly increase joint welfare. Of these, the behaviors that most increase the joint surplus of the parties to an interaction will be chosen more often than those that do not.[56]

However, advocating a decentralised system where local communities are guided by international norms and have the constitutional protection to do so, admittedly means that there has to exist the trust that the rules of the international system are, in fact, adaptable enough to recognize and protect localized interests according to international standards. There is also the issue of the international norm clashing with localized community and political interests, as is the case with administration of the death penalty. As Novak elaborates:

> The abolition of the mandatory death penalty throughout the Commonwealth Caribbean was a striking success of the incrementalist litigation strategy pursued by human rights activists working toward the goal of total abolition. By bringing petitions before the U.N. Human Rights Committee and the Inter-American Human Rights System, these advocates succeeded in building up a persuasive body of death penalty jurisprudence under international treaty obligations. National courts of appeal and eventually the Privy Council, the court of highest appeal for most countries of the Commonwealth Caribbean, drew from this persuasive jurisprudence in a series of constitutional challenges that led to the dramatic restriction of the scope of the death penalty in the region. This success came at a cost. Because of wide public support for the death penalty as a result of increasing crime rates and the colonial underpinnings of the Privy Council appeals process, these strides toward death penalty abolition had

[56] Ibid, pp. 886-887.

> the appearance of being externally imposed by Britain, the former colonial power. The result was the creation of a new Caribbean Court of Justice as a regional court of final appeal, though the Court has thus far adhered to the parameters of the Privy Council's earlier judgments.[57]

Novak's discourse raises an important issue of how the Caribbean Court of Justice (CCJ) would continue to treat with the jurisprudence of the Judicial Committee of the Privy Council (JCPC) in terms of the application of international norms. On this point, it would appear that the CCJ has already integrated international human rights norms, and indicated its willingness to be guided by international precedents as was discussed in chapter VI. As such, in recognizing the decentralised nature of international law and its value to the CCJ, Lord Gifford has stated, "...no one should imagine that the CCJ will reverse the decisions of the Privy Council. Those decisions were based on a consensus of authority from courts around the world, and the CCJ has already shown that it respects that consensus."[58] As also discussed in Chapter VI, the CCJ jurisprudence currently indicates a willingness to allow private entities with adequate *locus standi* access to appear before the court.

The challenge of globalization of Commonwealth Caribbean constitutional law

According to the United Nations Committee on Economic Social and Cultural Rights (CESCR), globalization:

> is usually defined primarily by reference to the developments in technology, communications, information processing and so on that have made the world smaller and more interdependent in very many ways. But it has also come to be closely associated with a variety of specific trends and policies including an increasing reliance upon the free market, a significant growth in the influence of international

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[57] Andrew Novak, The Global Decline of the Mandatory Death Penalty: Constitutional Jurisprudence and Legislative Reform in Africa, Asia, and the Caribbean (Surrey: Ashgate Publishing, 2014), 72.
[58] Anthony Gifford, *'The Death Penalty: Developments in Caribbean Jurisprudence,'* International Journal of Legal Information, Volume 37 Issue 2 (2009), 196-203, 202.

> financial markets and institutions in determining the viability of national policy priorities, a diminution in the role of the state and the size of its budget, the privatization of various functions previously considered to be the exclusive domain of the state, the deregulation of a range of activities with a view to facilitating investment and rewarding individual initiative, and a corresponding increase in the role and even responsibilities attributed to private actors, both in the corporate sector, in particular to the transnational corporations, and in civil society.[59]

It is suggested that globalization is a double movement in the sense that it can either be driven 'from above' or from a grassroots level. Top-down neoliberal globalization can be actually counterintuitive to more simple classic economic liberalism where the individual is empowered at a localized, or national level to have the unrestricted choice and ability to participate in the economic market. Doyle and Gilbert explain the dangers of the concept of neoliberal globalization in stating:

> Associated with the free and largely unregulated movement of capital is the potential for speculation on a scale greater than the total value of goods traded in the global economy. The objective and outcome of this speculation is not necessarily to increase general living standards or productivity but rather to maximize individual financial gains. As recent experience has shown in the context of the global financial crisis, this speculation has the potential to destabilize the entire global economy.[60]

It is in this arena that the CCJ as an international court would have an important role to play in the protection of local actors from the harmful effects of neoliberal globalization, as well as to empower local actors through recognition of their economic, social and cultural rights. Caserta and Madsen suggest that the dual structure of the CCJ

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[59] United Nations Committee on Economic Social and Cultural Rights (CESCR) Statement 'Globalisation and Economic, Social and Cultural Rights', UN Doc E/1999/22-E/C.12/1998/26, Ch VI, s A, Para. 515(2).

[60] Cathal Doyle and Jérémie Gilbert, 'Indigenous Peoples and Globalization: From "Development Aggression" to "Self-Determined Development"', *European Yearbook of Minority Issues*, 8 (2009), 219-262, (p. 221).

is one which has the possibility of lending to a fusion between globalization and decolonization:

> The CCJ's unique double jurisdiction—original over Community law and appellate over other civil and criminal matters—underscores the complex sociopolitical context and transformation of which it is a part. Whereas the CCJ's original jurisdiction over the RTC suggests a new, more judicialized approach to Caribbean integration, the Court's appellate function is intended to repatriate to the Caribbean the development and control over the common law. This combination of globalization and latter-day decolonization is fundamental for understanding the Court's authority.[61]

It is hoped that the CCJ as a decentralised regional court is able to ensure through its jurisprudence that the decolonization process provides resistance to neoliberal globalization favouring powerful actors at the expense of less powerful individuals and communities. However, constitutional reform in itself remains a responsibility of each individual Commonwealth Caribbean state and as discussed in Chapter VI there is always the likelihood of political institutions opposing the CCJ on policy decisions that conflict with the policy objectives of the political institution, despite the policy contradicting with international norms.

5. Future stability or future exploration?

Commonwealth Caribbean states, with the exception of Guyana, have remained "remarkably faithful"[62] to the Westminster modelled system of governance. By means of the discussion throughout the thesis, the outcome is evidenced that despite an ongoing regional rhetoric promoting constitutional reform, the fundamental institutional structures of Commonwealth Caribbean constitutions largely remain unchanged, and revisions

[61] Salvatore Caserta and Mikael Madsen, Between Community Law and Common Law: The Rise of the Caribbean Court of Justice at the Intersection of Regional Integration and Post-Colonial Legacies (Copenhagen: iCourts, 2016), 5.
[62] O'Brien, *Constitutional Systems of the Commonwealth Caribbean* (see n. 1, p. 272), 277.

modest.[63] The need to strengthen and revitalize democracy is credited as a recurring theme of the discussion, particularly in terms of "participation, legitimacy, accountability, local governance and the people's constituent power.[64] Notwithstanding calls for reform across the Commonwealth Caribbean, and within this thesis, the fact remains that Commonwealth Caribbean societies are comparatively stable in terms of not experiencing revolutionary threats to democracy, and its constitutions have not experienced low life expectancy as compared to other countries in the Americas.[65] There is also no threat of inter-state violence, nor any disputes that have resulted in substantial diplomatic fallouts. To some, democratic stability might be sufficient indicator of the success of the Westminster system, and the rule of law. Yet, the problem of a lack of comprehensive reform process to ensure a constitutional and rule of law framework tailored to the region's localized needs continues to exist. This lack of reform "marks the region out from the rest of the postcolonial world where rapid constitutional reform has been taking place..."[66] By advocating the revisiting of current rule of law norms, this thesis has largely attempted to make the case for self-determination – at a regional level, at an institutional level and at a more localized, community-centred level. In terms of considering the objective of examining a process of post-colonial 'certainty,' it has discussed threats to self-determination in terms of the legacies of the region's colonial past and its legal manifestations, economic designs, and globalization. It has also made the concluding case for constitutional revision based on decentralisation as an avenue by which actors at a grassroots level can be able to drive a "bottom up" economic revolution. It is hoped that in the future, all actors subject to the rule of the law in the Commonwealth Caribbean are

[63] Zachary Elkins, Tom Ginsburg and Justin Blount, 'Constitutional Reform in the English-Speaking Caribbean: Challenges and Prospects', Conference Paper of the Conflict Prevention and Peace Forum (January 2011),, 17.
[64] Ibid, 15.
[65] Ibid, 17.
[66] O'Brien, *Constitutional Systems of the Commonwealth Caribbean* (see n. 1, p. 272), 277.

given all necessary legal protection allowing them to freely participate in society, and the economic system. Only then might it be the case that these actors are able to successfully self-determine, and to influence institutional self-determination.

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